Further Notes on Byzantine Marriage: Raptus—ἁρπαγή or μνηστεῖαι?

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When the empire became Christian, the decisive thinking on Christian marriage had already been done.[1] Thereafter it was up to legislation on the one hand and practice on the other. Legislation was double: civil and ecclesiastical, and so was practice, not merely because of these two coexisting and differently oriented authorities, but also because the Church, as well no doubt as lay jurists, were divided into rigorists and realists.[2] The bishop in charge of a sinner—ὁ ἐξουσίαν λύειν καὶ δεσμεῖν παρὰ Θεοῦ λαβών—was given complete liberty, at an early date, to decide on the appropriate measures. "Tel métropolite, tel synode d'une Église autocéphale agira librement, sans que sa décision engage les instances hiérarchiques voisines."[3]

Though the precise penance for each sin was canonically prescribed, it was specified—as early, at least, as Neocaesarea (before A.D. 325)—that quality outweighed quantity: "The duration prescribed [for the penalty] is clear, but repentance and faith abridge the time." Basil's explicit statement (canon 74[4]) that the decision rested with the bishop in charge was to stand as one of the fundamental rules of Orthodox canon law: "Should anyone who fell into the sins listed confess earnestly, if he to whom binding and loosing has been entrusted by God's mercy [the bishop], perceiving that the sinner's confession outweighs the penalty, should show himself more lenient and reduce its duration, he incurs no blame, since the parable in Scripture shows us that those who confess with more grief receive God's mercy sooner."[5] Canon 16 of Chalcedon gave formal expression to this role of the bishop: "We define that leniency . . . shall lie at the discretion of the local bishop."[6]

The nature and aim of *oikonomia* was defined by the Council in Trullo of 692, which was to become the accepted code of Orthodox ecclesiastical legislation: canon 102 of the synod defines with some precision the nature and aim of *oikonomia:*

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[1]See my earlier study, "Indissolubility and the Greater Evil: Three XIIIth c. Byzantine Divorce Cases," in *Church and People in Byzantium,* University of Birmingham, 1991 (*Acta* of the Twentieth Spring Symposium, Manchester, 1986), 87–105.

I wish to express my gratitude to Dr. Peter Mackridge for communicating to me the text of his communication to the Twenty-sixth Spring Symposium of Byzantine Studies, Birmingham, 1991, "Bride-Snatching in *Digenis Akrites* and in Cypriot Heroic Poetry."

[2]Preservation is uneven. For civil law outside legislation little is left, and that presumably slanted: because the law was harsh, ingenious achieving of soft sentences was technically more interesting than obtaining a harsh one without any effort.

[3]C. Vogel, "Application du principe de l' 'Economie' en matière de divorce dans le droit canonique oriental," *Revue de droit canonique* 32 (1982), 81–100.

[4]Ἐὰν μέντοι ἕκαστος τῶν ἐν τοῖς προγεγραμμένοις ἁμαρτήμασι γενομένων σπουδαῖος γένηται ἐξομολογούμενος, ὁ πιστευθεὶς τῆς τοῦ Θεοῦ φιλανθρωπίας λύειν καὶ δεσμεῖν, εἰ φιλανθρωπότερος γένοιτο, τὸ ὑπερβάλλον τῆς ἐξομολογήσεως ὁρῶν τοῦ ἡμαρτηκότος, εἰς τὸ ἐλαττῶσαι τὸν χρόνον τῶν ἐπιτιμίων, οὔκ ἐστι καταγνώσεως ἄξιος, τῆς ἐν ταῖς Γραφαῖς ἱστορίας γνωριζούσης ἡμῖν τοὺς μετὰ μείζονος πόνου ἐξομολογουμένους ταχέως τὴν τοῦ Θεοῦ φιλανθρωπίαν καταλαμβάνειν. See also Basil 3 (deacon who has committed fornication); Basil 7; Basil 84; more particularly 26: ἡ πορνεία γάμος οὐκ ἔστιν . . . ὥστε ἐὰν ᾖ δυνατὸν τοὺς κατὰ π. συναπτομένους χωρίζεσθαι, τοῦτο κράτιστον· ἐὰν δὲ στέργωσιν ἐκ παντὸς τρόπου τὸ συνοικέσιον, τὸ μὲν τῆς π. ἐπιτίμιον γνωριζέτωσαν, ἀφιέσθωσαν δὲ, ἵνα μὴ χεῖρόν τι γένηται. Here it is not merely a matter of reducing the penalty: the sin is in some measure condoned if accompanied by repentance; see Karlin-Hayter, "Indissolubility" (above, note 1).

[5]Attribution to Basil: ". . . die drei 'kanonischen' Briefe an Amphilochios von Iconium, 188, 199, 217 welche erfolglos von Molckenbuhr (gest. 1825) und Binterim (gest. 1855) als unecht bekämpft wurden. Aus diesen drei und einigen andere Briefen sind schon früh 92 Kanones zusammengestellt worden, welche zu hohem Ansehen gelangten und früher als die 'kanonischen' Briefe anderer Kirchenväter in die Gesetzsammlungen der gr. Kirche Aufnahme fanden . . . O. Seeck tritt entschiedend für die Echtheit der genannten Briefe ein und verlegt die Abfassung in die Jahre 356–372." O. Bardenhewer, *Geschichte der altkirchlichen Literatur,* IV (Darmstadt, 1962), 156.

[6]Ὡρίσαμεν δὲ ἔχειν τὴν αὐθεντίαν τῆς ἐπ' αὐτοῖς φιλανθρωπείας τὸν κατὰ τόπον ἐπίσκοπον.

> Those who have received from God the power to loose and to bind must consider both the nature of the sin and the sinner's readiness to return, adapting the cure to the case, so as to avoid putting the sufferer's salvation into jeopardy through excess in either direction. . . . A disease propagates and spreads until the physician manages to arrest it. A skilled spiritual healer must first consider how the sinner is disposed, whether he wishes to be healed or whether, on the contrary, his whole behavior is an invitation to disease, [in which case, the physician] must consider how to work for a first stage in his recovery, and—if he does not resist . . . so that the soul's ulcer is made worse by the medicine applied to it—temper mercy to deserts. For the whole question, in the sight of God, and as far as regards the pastor to whose care [the flock] is entrusted, is bringing back the sheep that are lost and healing those bitten by the serpent, neither driving them over the precipice of despair nor giving free rein to a dissolute life and recklessness (κατα-φρόνησις)."[7]

If in doubt, the bishop laid the case before his metropolitan to be debated by the synod of the eparchy or submitted to a recognized authority such as St. Basil. From what date was it referred to Constantinople, to the *endēmousa?* Probably with the first bishop of weight to occupy Constantinople's episcopal throne, certainly long before the Council of Chalcedon (451). But the decision, once reached, was not taken as binding for any other cases, and Balsamon repeatedly refers to contradictory interpretations.[8]

The documentation for the later period is abundant, showing that, though the *endēmousa* had been the ultimate court of appeal, it no longer was, and the precedents it created might be repealed. Thus the synod under Luke Chrysoberges (1157–70) was responsible for the decision (*Régestes,* no. 1068) extending the prohibited degrees of consanguinity to the seventh and reversing the decisions of the synod under Alexios Stoudites (1025–43), which were considered over-indulgent. The synod under Michael of Anchialos (1170–78) declared that the extended prohibition of marriage through equation of affinity with consanguinity, found in the Tome of Xiphilinos (1064–75), was contrary to both the laws and the canons.[9] Before this, the synod under Nicholas Mouzalon (1147–51) had already allowed a marriage, διὰ τὸ τὴν μνηστείαν τόπον τελείου γάμου μὴ ἐπέχειν.[10] Under Michael of Anchialos, again, the synod, in respectful disagreement with the emperor, refused to dissolve a marriage that he considered improper.[11] In practice there was a constant struggle between pastoral humanity and decisions of an abstract, almost mathematical, character, such as the ruling of Luke Chrysoberges that "he who has married a woman who had been engaged, once or twice, to another man (even) before she was ten, if the engagement was blessed, is excluded from the priesthood,"[12] and that of the synod under Luke's successor, Michael III of Anchialos, forbidding "one in holy orders to marry a relation of the girl he had once been engaged to, although the engagement had not been blessed, unless she had died at the age of six and consequently not known desires of the flesh."

Rulings for clerics are in a case by themselves, with reference to St. Paul,[13] yet the sources show that even these were largely disregarded. Basil, in his canon 3, on deacons who have fornicated, stresses the need to temper severity to the individual character. There is a *Peira* case involving both ecclesiastical and civil courts, each practicing conspicuous *oikonomia*—the former to a priest. A

[7] Δεῖ δὲ τοὺς ἐξουσίαν λύειν καὶ δεσμεῖν παρὰ Θεοῦ λαβόντας σκοπεῖν τὴν τῆς ἁμαρτίας ποιότητα καὶ τὴν τοῦ ἡμαρτηκότος πρὸς ἐπιστροφὴν ἑτοιμότητα, καὶ οὕτω κατάλληλον τὴν θεραπείαν προσάγειν τῷ ἀρρωστήματι, ἵνα μὴ τῇ ἀμετρίᾳ καθ' ἑκάτερον χρώμενος, ἀποσφαλείῃ πρὸς τὴν σωτηρίαν τοῦ κάμνοντος. Οὐ γὰρ ἁπλῆ τῆς ἁμαρτίας ἡ νόσος, ἀλλὰ . . . τὸ κακὸν ἐπὶ πολὺ διαχεῖται καὶ πρόσω βαίνει, μέχρις ἂν σταίῃ τῇ δυνάμει τοῦ θεραπεύοντος. Ὥστε τὸν τὴν ἰατρικὴν ἐν πνεύματι ἐπιστήμην ἐπιδεικνύμενον πρότερον χρὴ τὴν τοῦ ἡμαρτηκότος διάθεσιν ἐπισκέπτεσθαι, καὶ εἴτε πρὸς τὴν ὑγίειαν νεύει, ἢ τοὐναντίον διὰ τῶν οἰκείων τρόπων προσκαλεῖται καθ' ἑαυτοῦ τὸ ἀρρώστημα, ἐφορᾷν ὅπως τε τῆς ἐν τῷ μεταξὺ προνοεῖται ἀναστροφῆς, καὶ εἰ μὴ τῷ τεχνίτῃ ἀντιπαλαίει, καὶ τὸ τῆς ψυχῆς ἕλκος διὰ τῆς τῶν ἐπιτιθεμένων φαρμάκων αὐξάνει προσαγωγῆς, καὶ οὕτω τὸν ἔλεον κατ' ἀξίαν ἐπιμετρεῖν. Πᾶς γὰρ λόγος Θεῷ καὶ τῷ τὴν ποιμαντικὴν ἐγχειρισθέντι ἡγεμονίαν τὸ πλανώμενον πρόβατον ἐπαναγαγεῖν, καὶ τρωθὲν ὑπὸ τοῦ ὄφεως ἐξιάσασθαι, καὶ μήτε κατὰ κρημνῶν ὠθῆσαι τῆς ἀπογνώσεως, μήτε τὸν χαλινὸν ἐπιδοῦναι πρὸς τὴν τοῦ βίου ἔκλυσίν τε καὶ καταφρόνησιν. In Trullo 102.

[8] E.g., to Neocaes. 2: μὴ εἴπῃς ἐναντιοῦσθαι τῷ παρόντι κανόνι τὸν τοῦ μεγ. Βασιλείου . . . ; to In Trullo 2: τοῦ παρόντ. καν. μέμνησο διηνεκῶς· ἐπιστομίσεις γὰρ δι' αὐτοῦ τοὺς λέγοντας . . . ; to In Trullo 8: καὶ ταῦτα μὲν ἴσως ἐρεῖ τις· σὺ δὲ ἀνάγνωθι ἐπιστατικώτερον τὸ κ′ κεφάλ.

[9] Tome of Xiphilinos: *Régestes des actes du patriarcat de Constantinople,* 2nd ed., ed. V. Grumel and J. Darrouzès (Paris, 1989) (hereafter *Régestes*), no. 896, 26 April 1066; confirmed 19 March 1067; *Lysis* of Michael of Anchialos, no. 1130, A.D. 1175. K. P. Pitsakes, Τὸ κώλυμα γάμου λόγῳ συγγενείας ἑβδόμου βαθμοῦ ἐξ αἵματος στὸ Βυζαντινὸ δίκαιο (Athens, 1985) (hereafter Pitsakes), 197.

[10] *Régestes,* no. 1029; cf. Balsamon to Basil 69.

[11] See J. Darrouzès, "Questions de droit matrimonial: 1172–1175," *REB* 35 (1977), 107–57.

[12] *Régestes,* no. 1087 (11), Synodal responses attributed to the patriarchate of Luke Chrysoberges (1157–70). The tradition is unsatisfactory (see ed. comm.), but it is in the style of Chrysoberges' synod and concerned with the marriage of priests. Pitsakes, 297.

[13] St. Paul: 1 Tim. 3:2 (τὸν ἐπίσκοπον . . . μιᾶς γυναικὸς ἄνδρα); 3:12 (διάκονοι . . . μιᾶς γυν. ἄνδρες); Tit. 1:5 (πρεσβυτέρους . . . ἀνέγκλητος, μιᾶς γυν. ἀνήρ). Canons, e.g., Apost. 17; Basil 12; Trullo 3.

widow was taken to court by her in-laws for having a lover. Rhomaios ruled in her favor, while his investigations revealed that the lover was a priest living in her house under pretence of being a slave, that the matter had been brought before the Great Church, and the man had not been condemned but allowed to continue in his ministry.[14] It looks almost more like the rule than the exception when Balsamon writes: "How to reconcile this [canon] with the fact that any number of anagnosts have married twice and kept their places, and even, thanks to chits from bishops, been promoted, I do not know."[15]

If canon law was in the hands of the bishop, civil law worked by circumventing the constitutions, rescripts, and other written sources that failed to give the "just" sentence. In one and the same case the sentence might, by ingenious combination of contradictory laws, achieve whichever was right in the opinion of the judge, *oikonomia* or rigor.[16] The most famous practitioner was Eustathios Rhomaios, but the interdict laid on interpretation by Justinian is witness, in the sixth century, to a practice as old as law. With the passage of time and an increase in the number of legislative texts, new possibilities appeared.

Nicolas Oikonomides has given his valuable article, "The 'Peira' of Eustathios Romaios: An Abortive Attempt to Innovate in Byzantine Law,"[17] a title that stems from a conception of what a legal system ought to be. My idea is to see where one gets by trying to discover it as it was. For an "abortive attempt," Eustathios' practice was extremely successful, and long admired and imitated. Furthermore, though particularly brilliant, it was perhaps not an "attempt to introduce in Byzantium new concepts on law and justice, based on . . . concrete reality." Concrete reality had always had its partisans, and the wealth of ambiguous or alternative material had long made of law and justice healthily elastic concepts. Bishops, judges, and even emperors followed the same pattern of defeating the law by the law, on occasion voiding a decree of its substance under the pretext of validating it.[18] Reality—and even emperors could not eliminate it, as Alexios, among others, found out—was defended or dismissed in terms, I repeat, of *oikonomia* or rigor.

It is often implied that the choice was dictated by the high social standing of the parties, and there are a few cases that obviously follow this pattern, but overall, in the body of practice that has survived, the proportion where *oikonomia* is shown to very modest persons is high.

The tug-of-war between the two options is the background to the whole history of marriage in the Byzantine Empire. Origen already, in a much-quoted passage, tells us that there were bishops who allowed a woman to remarry while her husband was still alive. And, after noting that they are acting contrary to Scripture—in terms reminiscent of 1 Cor. 7:39—he continues: "not entirely unreasonably . . . in comparison with worse offenses."[19] There is no possible doubt that, in the absolute, he believed that marriage must conform to Scripture,[20] and that these bishops were allowing those women to commit adultery. Yet, "not entirely unreasonably." Wherever we have evidence, it is of the existence of two competing opinions. The more emphatically one side lays down the law, the surer evidence he gives of conflict. Even at a time of such great religious tension as that following the first Iconoclasm, the Orthodox leadership split over a marriage question.

Nonetheless, *oikonomia* represented no easy choice to its partisans, a choice that was shouldered by men of the stature of Origen or Chomatianos, but it was no light burden, and Theodore of Stoudios and others unquestionably bought their saint-hood more cheaply.

So many excellent studies, both articles and books, have been devoted to marriage in the Byzantine Empire that it is presumptuous to imagine I have anything to add. Yet it seems to me that the struggle I spoke of tends to disappear behind a strictly legalistic approach or attempts, for example, to "situer exactement la doctrine de l'indissolubilité"[21] or identification—invariably with the rigorous: "Da hatte ein hl. Johannes Chrysos-

[14] The *Peira:* Sentences of the *magistros* Eustathios Rhomaios, in Zepos, *Jus*, 4.25.4.

[15] "Οπως δὲ ἀναγνῶσται πολλοὶ διγαμήσαντες, εἰς τοὺς οἰκείους τόπους συνετηρήθησαν καὶ διὰ πιττακίων ἀρχιερατικῶν εἰς μείζονας βαθμοὺς προεβιβάσθησαν, ἀγνοῶ. To Apost. 17.

[16] In Karlin-Hayter, "Indissolubility" (above, note 1), a complex case of this is examined.

[17] *Fontes Minores* 7 (1986), 169–92.

[18] See below, p. 149 and note 96.

[19] "Ηδη δὲ παρὰ γεγραμμένα καί τινες τῶν ἡγουμένων τῆς ἐκκλησίας ἐπέτρεψάν τινα, ὥστε ζῶντος τοῦ ἀνδρός, γαμεῖσθαι γυναῖκα, παρὰ τὸ γεγραμμένον μὲν ποιοῦντες . . . οὐ μὴν πάντη ἀλόγως· εἰκὸς γὰρ τὴν συμπεριφορὰν ταύτην συγκρίσει χειρόνων ἐπιτρέπεσθαι παρὰ τὰ ἀπ' ἀρχῆς νενομοθετημένα καὶ γεγραμμένα. Origen, *Comment in Math.* 14, 23, P G 13, col. 1245 A.

[20] L'Huillier, "Le témoignage d'Origène en matière de remariage après séparation," *Revue de droit canonique* 28 (1978), 17.

[21] J. Gaudemet, "L'interprétation du principe d'indissolubilité du mariage chrétien au cours du premier millénaire," *Bulletino dell' Istituto di diritto romano,* 3a ser. 20 (dell'intera collez. 81) (Milan, 1978), 64.

tom gegen die bei den Hochzeiten vorkommenden Auswüchse einen harten Kampf zu führen."[22] It can be seen the other way round: Ordinary pious citizens who happened not to be saints had to fight hard for the right to a little fun at weddings.[23]

St. Basil recognized that the demands of the ideal and reality had to be reconciled: "Seeing we are not judges of the hearts, but judge from what we are told, we leave vengeance (ἐκδίκησις) to the Lord; for ourselves, we receive him [the man under discussion] without discrimination, allowing forgiveness to human failing."[24] "Renouncing the fault is in every way a truer healing . . . but we [those entrusted with pastoral care] must know both the way of rigor and that of custom, and with those who will not accept rigor allow common custom."[25]

Debate in synod saw the marriage question constantly recurring: Ἐρωτῶ περὶ τοῦ πολλάκις ἐρωτηθέντος συνοδικῶς, notes Balsamon at the beginning of his commentary to nomocanon 13.2 on marriage and engagement.

[22] K. Ritzer, *Formen, Riten und religioses Brauchtum der Eheschliessung in den christlichen Kirchen des ersten Jahrtausends,* Liturgiewiss. Quellen und Forschungen 38 (Münster, 1962) (hereafter Ritzer), 42.

[23] "We have nothing in the holy canons to prevent drunken horseplay at weddings, but all the Fathers instructed any priest present to put a stop to this. If you can stop this with warnings and exhortations, you will have your reward." *Régestes,* no. 990 [972] "? vers 1094," Canonical replies to the bp. of Zetounion, ed. J. Darrouzès, "Les réponses de Nicolas III à l'évêque de Zétounion," in ΚΑΘΗΓΗΤΡΙΑ (Camberley, 1988), 327–43, here 342. E. Papagianne and Sp. Troianos, "Die kanonischen Antworten des Nikolaos III Grammatikos an den Bischof von Zetunion," *BZ* 82 (1989), 234–50, here 237.

[24] Canon 10: Ἐπειδὴ δὲ οὐκ ἐσμὲν καρδιῶν κρίται, ἀλλ' ἐξ ὧν ἀκούομεν κρίνομεν· δῶμεν τῷ Κυρίῳ τὴν ἐκδίκησιν, αὐτοὶ δὲ ἀδιακρίτως αὐτὸν δεξώμεθα, συγγνώμην δόντες ἀνθρωπίνῳ πάθει.

[25] Canon 3: καθόλου ἀληθέστερόν ἐστιν ἴαμα ἡ τῆς ἁμαρτίας ἀναχώρησις, but ἀμφότερα . . . εἰδέναι ἡμᾶς δεῖ, καὶ τὰ τῆς ἀκριβείας, καὶ τὰ τῆς συνηθείας. ἔπεσθαι δὲ ἐπὶ τῶν μὴ καταδεξαμένων τὴν ἀκρότητα τῷ παραδοθέντι τύπῳ. "Custom": J. Dauvillier and C. de Clercq (hereafter Dauvillier-de Clercq), *Le mariage en droit canonique oriental* (Paris, 1936), 84, equates St. Basil's συνήθεια with "la coutume de l'Église de Cappadoce." Though the church of Cappadocia was not unsophisticated, this is perhaps too restrictive. Basil uses the term in his canons, of ecclesiastical custom (3, 4 [τῶν προειληφότων ἀκολουθία], 9, 21) or, on the contrary in explicit opposition to it (1, 83). Canon 3 is the most explicit: Basil, after giving the rule for a deacon who has committed fornication, continues: ταῦτα μὲν οὖν τὰ ἐκ τῶν τύπων· καθόλου δὲ ἀληθέστερόν . . . (see above). If the fornicating deacon won't take rigor, συνήθεια it will have to be. Recognizing just what "custom" is meant is going to be hazardous. One thing seems to me certain: This canon was open to interpretation.

In 9 and 21 reference is to the sexual discrimination in the attitude to adultery that was hardly peculiar to the church of Cappadocia.

I propose to look at two specific questions prominent in the field of marriage legislation, both civil and canonical: abducting and engagement. The first has, unless I am mistaken, attracted little attention;[26] the second has given rise to a considerable literature.

I. Raptus—ἁρπαγή

In one of the marriages of Judaic and classical thought or tradition characteristic of the formation of Christianity, we find, in the early fourth century, a crime whose antecedents in Roman civil law are found in the field of banditry, suddenly diverted to sex and taking unexpected prominence in the civil codes, while at the same time it enters canonical legislation. In the latter it is expressed in terms strongly influenced by Deuteronomy.[27] As, however, the crime was not one known to Mosaic law, terms for a different but related one were adopted. Penalties designed to save the individual sinner were substituted for punishments aimed at safeguarding the community, threatened, through the misdoer's action, in the Jewish case with pollution, in the Roman with disorder.

The crime was *raptus,* the ravishing or carrying off of a girl or woman.[28] A first peculiarity arises from this specialization of a word more often used in classical or earlier legal Latin for plundering, and the diverting of legislation on carrying off of goods, *rapina,* to carrying off of females. A second lies in the even more highly specialized meaning the word assumes in the canons, due neither to Roman nor Judaic law. In the canons, ἁρπαγή came, very early, to mean exclusively abducting in order to marry.[29] This is abundantly clear from the usage

[26] Even such closely studied monographs as R. Bonini, *Ricerche di diritto giustinianeo* (Milan, 1968) or M. Balzarini, *Ricerche in tema di danno violento e rapina nel diritto romano* (Padua, 1969) make only passing reference to it.

[27] See below, p. 145.

[28] Cf. P. Mackridge's observations on the use of *apelatai* in Digenis Akrites: "The *apelatai* are never depicted as stealing, driving away or trying to steal or drive away anything except brides. . . . One of the conditions that [Philopappous] sets [Digenis] when he asks to join the *apelatai* is the abduction of a noble bride from her cortege"; "Bride-snatching in *Digenis Akrites* and in Cypriot Heroic Poetry," paper presented at the Twenty-sixth Spring Symposium of Byzantine Studies, Birmingham, 1991, ms. p. 5.

Neither word had lost its original meaning: ἁρπάζειν see, e.g., Hexabiblos, bibl. 6, title 7, 6–9, ed. Pitsakes, p. 357; ἀγέλας ἀπελαύνειν, ibid. 5, 13 and scholion.

[29] The intention at least is implicit in Basil's canons and explicit in Chalcedon 27 (= In Trullo 92): ἐπ' ὀνόματι συνοικεσίου.—τοὺς ἐξ ἁρπαγῆς ἔχοντας γυναῖκας: "Those who have wives by ravishing . . .": γυναῖκα here certainly means "wife" rather than "woman." In canon 22 the expression ἔχειν γυναῖκα

of the term. It does not cover adultery, while rape or seduction are seen simply as a possible additional factor. Canonical ἁρπαγή not only assumes marriage as the aim of the parties, one may conjecture it had more often than not already been officialized when the parties came asking for penance. (Being admitted to begin one's penance was, of course, a privilege, since it implied reconciliation with the Church.)

Marriage, during the first centuries of the Christian empire, was still, before the law, a civil contract concluded and terminated with few formalities. The bride's entering the husband's house as his recognized partner in fact sufficed: *domumductio* with pledge of *individua vitae consuetudo* and thereafter mutual *honos matrimonii.*[30] In short, if the couple wanted to say they were married, married they were. Very early on, marriage came to be accompanied by Christian rites, but these remained the complement of customary formalities, not a substitute for them.[31] In the words of P. L'Huillier: "the ancient Church did not try to elaborate a special doctrine about marital bond formation . . . Church authorities did not question the fact marriage was concluded in accord with civil laws and local customs."[32] The expression used by Basil, to the effect that, in certain conditions, "the marriage may stand"—ἵστασθαι τὸ συνοικέσιον—is best justified if it has already taken place. Indeed it may even, sometimes, have been blessed: Chalcedon 27 (= In Trullo 92), in edicting penalties for those who cooperate with the ravisher, stipulates that if they are clerics, they are to be degraded (εἰ κληρικοὶ εἶεν, ἐκπίπτειν τοῦ ἰδίου βαθμοῦ), a regular procedure with priests who have solemnized forbidden marriages.[33] The specific provision here for clerical collusion is most easily understood if priests occasionally agreed to marry the runaways. To this we may add the evidence of novel 74.5: the abductors "swearing in consecrated edifices to hold them for their lawful wives," followed by cohabitation and childbearing, can only refer to the form, at least, of marriage blessing.

Needless to say, there were accidents, and it is with these that this last novel is concerned: Justinian complains of being besieged by wailing women, denouncing men who had carried them off and taken them to their homes, swearing on the Scriptures, or in churches, to hold them for their lawful wives, and then, after keeping them a considerable time, perhaps having children by them, then, when their desire for these women was satiated, turned them, with or without their children, out of the house.[34]

In the terminology of canon law, ἁρπαγή meant abduction with intent to marry. However, in Deuteronomy, which provided the term, ἁρπαγή meant rape, and the word retained this sense for Gregory Thaumatourgos[35] (ca. 213–ca. 270).

Though Deut. 22 was the standard reference for sexual crimes, and first signs of canon law standardization of the term ἁρπαγή, with the new meaning, antedate St. Basil, with him it was definitely formalized. Two canons, one certainly, one

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occurs twice, but when the same person is referred to apart from her relationship with the ravisher she is called κόρη.

See also *Régestes,* nos. 832 and *848 under Alexios Stoudites (1025–43): "ravishing of the engaged girl by a relation of the man she is engaged to is not an impediment to marriage if she was not raped." (The general authenticity of *848, a series of extracts or summaries of synodic decisions, is not in question, the asterisk merely draws attention to the fact that it presents itself as an official act of Alexios Studites and his synod, which it cannot be.)

Cf. Balsamon to Basil 39 (girls who willingly follow their ravisher) κἂν γαμικῶς δόξωσι συναφθῆναι.

[30] Ritzer, 24. See also L. Desanti, "Costantino, il ratto e il matrimonio riparatore," *Studia et documenta historiae et iuris* 52 (1986), 195–217.

Marriage unconfirmed by a written contract (ἄγραφος) as defined in the *Ecloga,* ed. L. Burgmann (Frankfurt, 1983), 2.6, p. 178 would be about as easy to contract and to default on.

[31] E. Herman, "De benedictioni nuptiali quid statuerit ius byzantinum sive ecclesiastice sive civile," *OCP* 4 (1938), 199–234. Dauvillier-de Clercq: "L'évolution vers la forme solennnelle du m. se fit d'abord sur le fondement de l'*instrumentum dotale* dont Justinien avait prescrit la réd. pour le m. des hauts dignitaires"; (Nov. 117.4), p. 41.

[32] P. L'Huillier, "Novella 89 of Leo VI the Wise on Marriage . . . Theoretical and Practical Impact," *GOTR* 32 (1987), 153–62. He also points out that several of the In Trullo canons are concerned with marriage, but there is "no allusion to religious solemnization of weddings." This, he says, is "hardly fortuitous" (p. 155). See also idem, "The Indissolubility of Marriage in Orthodox Law and Practice," *St. Vladimir's Theological Quarterly* 32 (1988), 199–221.

[33] The Studite schism was over the failure of the patriarch Nikephoros to degrade the priest who had celebrated Constantine VI's marriage.

[34] Nov. 74.5. Justinian decrees that if the woman can show that her story is true, she is the man's lawful wife. If she had no dowry, she is entitled to a quarter of his property, etc.: ἐν εὐκτηρίοις οἴκοις ὁμόσαντες ἢ μὴν ἕξειν αὐτὰς νομίμους γαμετάς. The clandestine nature of the ceremony enabled the "husband" to deny it had taken place. If the woman could prove it had, and she was not of a rank for which the law made specific demands, it was valid.

[35] Gregory Thaumatourgos, *Ep. canonica* (PG 138), Rape in captivity, 517A–520A: εἰ μὲν καὶ πρότερον κατέγνωστό τινος ὁ βίος . . . δηλονότι ἡ πορνικὴ ἕξις ὕποπτος καὶ ἐν τῷ καιρῷ τῆς αἰχμαλωσίας. Καὶ οὐ προχείρως δεῖ ταῖς τοιαύταις κοινωνεῖν τῶν εὐχῶν. Εἰ μέντοι τὶς ἐν ἄκρᾳ σωφροσύνῃ ζήσασα . . . νῦν περιπέπτωκεν ἐκ βίας καὶ ἀνάγκης ὕβρει, ἔχομεν παράδειγμα τὸ ἐν τῷ Δευτερονομίῳ τὸ ἐπὶ τῇ νεάνιδι, ἣν ἐν τῷ πεδίῳ εὗρεν ἄνθρωπος.

conceivably, older[36] than his, invite comparison. Apostolic canon 67: "If a man rape (βιασάμενος ἔχοι) a girl who is not engaged, he shall be excommunicated. He shall not marry another, but have the one he has chosen even if she be indigent."[37] Ancyra 11: [The synod] resolved that girls who, after becoming engaged, are carried off by someone else should be restored to those to whom they were engaged before, even if they have suffered violence.[38]

Of the two, one is addressed to rape, the other to ravishing, abducting, or carrying off. The canonical outcome is not the same, but that could equally well result from the different situations of the girl, as "engaged"[39] or "free." Both are close to Deut. 22:23–29, which is concerned with rape only. Deuteronomy distinguishes three different situations: the girl may be engaged or free, and, in the former case, she may have been raped either "in the city" (i.e., "willing") or "in the wild" (i.e., "forced"). Of the two canons, each envisages only one of the three situations, Ancyra that of the engaged girl, Apostles that of the unengaged. With βία (βία–) mentioned in both, the unwilling girl appears to be designated, but these terms are often used loosely, if only to give the girl the benefit of the doubt. The Apostolic canon is closer to the Mosaic text in its terminology (παρθένον ἀμνήστευτον) and in the parallel solutions: if the girl is not engaged, the Deuteronomy rule is simple and straightforward—the man who has raped her must must pay her father fifty shekels of silver and marry her, and may never repudiate her. This last stipulation, which has no place in a Christian canonical text, is replaced by: "however poor she may be." The fine also is adapted: he must pay it to the girl's heavenly father, so to speak, in the form of an ecclesiastical penance (ἀφοριζέσθω). But most significant, the crime is still rape. In Ancyra 11 the girl is engaged, but the crime is now abduction. The sentence too is that of Basil's canon 22: she is to be returned to the man to whom she was engaged. Ancyra 11 is already on the highway of Byzantine canon law. No penance is mentioned in either canon. Apostles 67 is, then, noticeably more archaic than Ancyra 11. This does not, of course, mean that it is necessarily older, but the possibility is there.

Though its essential purpose remains reconciling the ravisher with the Church—a point so obvious that it is only obliquely dealt with, via the penance[40]—Basil's canon 22 is largely devoted to distinguishing when a ravisher may and when he may not marry the girl.

The penance is of considerable legal significance; since it extends over several years, it cannot be reconciled with execution, to which contemporary civil law condemned the ravisher. Basil's canons 22 and 30 were both in direct contradiction with civil law, and not merely implicitly by imposing four-year penalties, but also by allowing, if there were no other impediments, "the marriage to stand"—ἵστασθαι τὸ συνοικέσιον—(the offender being liable to penance whether or no), which was forbidden by successive civil laws in the most stringent terms. This contradiction, to which I shall return, further raises the question of the extent to which the civil law operated.

Chalcedon 27 (= In Trullo 92) stipulates undefined "penalties" for all who cooperate with ravishers. This Chalcedon canon was formulated under imperial patronage and with the help of senatorial commissions, and taken over verbatim by the Council in Trullo, which was no less closely associated with the throne, so it is hardly surprising that its circumspect terms, though ecclesiastically unimpeachable, are not in explicit conflict with the civil law either.[41]

As Balsamon puts it: "So much for the canon;

[36] Council of Ancyra, ca. 314. Though the collection known as the Apostolic canons belongs to the early 5th century, it includes older material, and this one might antedate Basil, in spite of his canon 30 (Περὶ τῶν ἁρπαζόντ., καν. μὲν παλαιὸν οὐκ ἔχομεν . . .), either because it had not come his way, apparently the case for Ancyra, or because it deals with rape, not abducting.

On the basic canonical collection (Ancyra, Neocaesarea, etc.), see R. Cacitti, "L'etica sessuale nella canonistica del cristianesimo primitivo," in *Etica sessuale e matrimonio nel cristianesimo delle origini*, ed. R. Cantalamessa (Milan, 1976), 80–81.

[37] Εἴ τις παρθένον ἀμνήστευτον βιασάμενος ἔχοι, ἀφοριζέσθω· μὴ ἐξεῖναι αὐτῷ ἑτέραν λαμβάνειν, ἀλλ' ἐκείνην κατέχειν ἣ ἡρετίσατο, κἂν πενιχρὰ τυγχάνῃ. Apost. 67.

[38] Μνηστευθείσας κόρας. καὶ μετὰ ταῦτα ὑπὸ ἄλλων ἁρπαγείσας, ἔδοξεν ἀποδίδοσθαι τοῖς προμνηστευσαμένοις, εἰ καὶ βίαν ὑπ' αὐτῶν πάθοιεν.

[39] See below, Μνηστεῖαι, p. 144.

[40] Τὸν μέντοι ἐκ διαφορᾶς εἴτε λαθραίας εἴτε βιαιοτέρας γυν. ἔχοντα ἀνάγκη τὰ τῆς πορνείας ἐπιγνῶναι ἐπιτίμια. ἔστι δὲ ἐν δ΄ ἔτεσιν ὡρισμένη . . . χρὴ δὲ τῷ πρώτῳ ἐκβάλλεσθαι τῶν προσευχῶν, καὶ προσκλαίειν αὐτοὺς τῇ θύρᾳ τῆς ἐκκλησίας. Τῷ δευτέρῳ δεχθῆναι εἰς ἀκρόασιν. κτλ. Bas. 22.

[41] When B. Biondi writes of *raptus:* "La legislazione va quasi di pari passo con la Chiesa nella repressione" quoting Ancyra 3, Chalcedon, and Basil, PG 32, col. 722 (*Il diritto romano cristiano*, III [Milan, 1954], 483) one must bear in mind his vision of the Christianization of the law under the Christian emperors, which tended to blind him to the reality of their text, and make him see them, in Cacitti's words, as "meccanicamente determinati secondo l'ispirazione" (Cacitti, "L'etica sessuale," 77 note 41).

civil law punishes ravishers another way."[42] In the civil law of Christian emperors the term *raptus* is used for the carrying off of a woman by a gang. The marital status of the victim is less relevant than is suggested by titles, which, up to the novel of 563, all refer to "virgins and widows." In fact, § 1a of Justinin's law of 533 states: ". . . Quae multo magis contra eos obtinere sancimus, qui nuptas mulieres ausi sunt rapere . . .," and the title itself of novel 143, "De raptis mulieribus et quae raptoribus nubunt," is unambiguous.

Conspiracy, the active participation of several persons, in any manner, before, during, or after the act, was, as far as Byzantine civil law was concerned, what constituted ἁρπαγή. Thus the offense is removed from the private to the public sphere and turned into a crime, not against the person or persons immediately affected, but against the law and the emperor. The words "Qui hostili more in nostra republica matrimonium student sibi conjungere . . ."[43] (*CI* 9.13.2) in the law of 533 show that it is this at issue, and not the sexual misdeed. Nor is the legislation that applies "De coercendis adulteriis." The focus has changed and association with violent intent is the law's concern, so evidently that one would expect "De vi publica" to be the relevant heading. In fact, in the "Lex Julia de vi publica" of the *Digest, raptus* is found only as an interpolation,[44] and Bonini points out that opinions are divided as to the heading under which abduction was classified.[45] One may ask whether the terms of "Dolo malo" are not even better suited: " 'Dolo' autem 'malo' facere potest (quod edictum ait) non tantum is qui rapit, sed et qui praecedente consilio ad hoc ipsum homines colligit armatos, ut damnum det bonave rapiat" (*Dig.* 47.8.2). With reference to this passage, Balzarini quotes § 10 and comments: "It would seem that the presence of *homines coacti* is required for the commission of *damnum,* while violence is necessary for there to be *rapina.*"[46]

At a much later date, and after the Iconoclast and Macedonian contributions, Eustathios Rhomaios clarifies the distinction between abduction and other offenses: "When a man comes with a band to someone's house and carries off a woman, whether consenting or against her will, the crime is ἁρπαγή and punished as such. But if he comes by himself, without accomplices, and carries off surreptitiously a woman who has surrendered herself to him, the crime is not ἁρπαγή but seduction of a virgin."[47] Though Rhomaios is of the eleventh century, this definition undoubtedly applied from the beginning of the Christian empire. Canon law could speak of ἀνεύθυνος ἁρπαγή—"blameless ravishing"[48]—this was a contradiction in terms from the viewpoint of civil law. The canons are

[42] Καὶ ὁ μὲν κανὼν ἐν τούτοις· ὁ δὲ πολιτικὸς νόμος ἀλλοτρόπως κολάζει τοὺς ἁρπαγας. Balsamon to Basil 22.

[43] This coincides exactly with the ecclesiastical definition of ἁρπαγή, while the same law is quoted above with reference to married women.

[44] "De vi publica," *Dig* 48.6.5.2: "Qui vacantem mulierem rapuit vel nuptam, ultimo supplicio punitur et, si pater iniuriam suam precibus exoratus remiserit, tamen extraneus sine quinquennii praescriptione reum postulare poterit, cum raptus crimen legis Iuliae de adulteris potestatem excedit."

Interpolation. Balzarini, *Ricerche,* 208: "Altre fattispecie . . . ricordate nel Digesto come rientranti nella previsione della lex Iulia de vi publica o della lex Iulia de vi privata, non sembrano reconducibili all'originario testo legislativo: tale . . . il ratto e il sequestro di persona." See also Bonini, *Ricerche,* 68; G. Pugliese, *Appunti sui limiti dell' "imperium" nella repressione penale* (Torino, 1939), 59 note 103; Desanti, "Costantino," 205, note 46.

The text represents Macedonian legislation, in conflict on three points with legislation from Constantine to Justinian: (1) If "her father gives way to entreaties and remits the injury done him," he is not apparently penalized, in opposition to *Theodosiani libri XVI* (*CTh*) 9.24.4; Justinian, *CI* 9.13; Justinian, *Nov.* 143. (2) Emperors Valentinian, Valens, and Gratian enacted a five-year prescription (*CTh* 9.24.3; *Nov.* 14.374.t3). A constitution of Const. Aug. of 25.4.326 does not allow the right of informing in this matter to outsiders (*CTh* 9.7.2).

Cf. *Eisagoge* (in Zepos, *Jus*) with reference to adultery: Πενταετίᾳ σβέννυται τὸ ἔγκλημα τῆς μοιχείας. ἀλλὰ τοῦτο λέγομεν περὶ τῶν εἰς ἑκοῦσαν ἡμαρτηκότων . . . 40. 40.3; likewise *Nomocanon XIV Titulorum* of 883: ὁ ὡρισμένος εἰς κατηγορίαν τῆς μοιχείας χρόνος τῆς πενταετίας, οὐκ ἔχει χώραν ἐπὶ τῆς κατὰ βίαν γενομένης φθορᾶς· ἀπροσδιορίστως γὰρ κινεῖται, ἐπειδὴ καὶ δημοσία βία πλημμελεῖται. ὁ ἁρπάσας γεγαμημένην ἢ μὴ γεγαμημένην, ἐσχάτως τιμωρεῖται, καὶ ἐξωτικοῦ κατηγοροῦντος, ἐὰν ὁ τῆς κόρης πατὴρ παρακληθεὶς συγχωρῆσῃ. *Syntagma canonum* 9.30, PG 104, col. 789B, note reference here to δημοσία βία.

[45] "Circa l'individuazione della *lex* alla quale il ratto veniva riportato le opinioni della dottrina non sono in realtà del tutto concordi; si riconesce tuttavia che solitamente il ratto veniva ricondotto alla *lex Iulia de vi.* . . . " Bonini, *Ricerche,* 68, note 1.

[46] Ibid., 7. Cf. *Eisagoge* distinction between "men" and "armed men."

[47] "Οτι ὅτε μετὰ πλήθους ἀφίκεταί τις εἰς οἰκίαν τινὸς καὶ εἴτε ἄκουσαν εἴτε ἑκοῦσαν ἁρπάσει γυναῖκα, ἁρπαγὴν πλημμελεῖ καὶ τιμωρεῖται· ὅτε δὲ μόνος ἀπέλθῃ, μή τινας ἔχων τοὺς συνυπουργηκότας, καὶ ἀφανῶς τὴν γυναῖκα ἑαυτὴν προδεδωκυῖαν ἀφελέσθαι θαρρήσει, οὐχ ἁρπαγὴν ἀλλὰ φθορὰν παρθένου ἁμαρτάνει. *Peira* 43.5, Zepos, *Jus* 4.236. Cf. the patriarchal tome of 1081: . . . 9. "La loi civile déclarant coupable de rapt et châtiant celui qui vient avec une troupe enlever une femme, qu'elle y consente ou non, au lieu que celui qui se présente seul pour enlever une femme avec son consentement commet un viol et non un rapt," *Régestes,* no. 919, p. 396, in A. Papadopoulos-Kerameus, "Varia sacra graeca," in *Sbornik grečeskih naisdannyh bogoslovkih tekstov IV–XVv.* (St. Petersburg, 1909), 34–36.

[48] Basil, canon 30; τὸ δὲ μὴ βιαίως γινόμενον, ὅταν μὴ φθορὰ ᾖ, μηδὲ κλοπὴ ἡγουμένη τοῦ πράγματος.

concerned with recovering the sinner religiously, and, a considerable number of them, with undoing, as far as possible, the social damage done to himself and others; the civil law is concerned with exemplary[49] *vindicta* and punishment.

This crime assumed extraordinary importance. Biondi writes: "Il ratto, contemplato dai classici sotto il profilo della *vis* e della *injuria,* si configura ora come reato autonomo e di particolare gravità."[50] In fact, in classical law *rapina* was essentially *bonorum.*

In endeavoring to understand the significance of Constantine's legislation, one should remember that marriage was a fundamental institution, undermining of which undermined the *res publica,* so that this legislation can be seen partly as reaction against the tendency to treat marriage as a private matter. At the same time, the Constantinian legislation on *raptus* raises a question of a quite different nature: what was the link between repression of banditry and the affirmation that marriage was first and foremost a civic act, that made the execution of the villain no longer a reaction tolerated in the family, but a duty assumed by the state?[51] I shall briefly return to this question. At all events, *raptus* became "figura criminosa a sé stante, non più compresa cioè fra i reati ricondotti alla *lex Iulia de vi.*"[52]

From then on it was the object of continuous legislation, both civil and ecclesiastical,[53] with the successive modifications that characterize the presence of a real and recurring problem.

The "Lex Julia de adulteriis coercendis," while sanctioning, with certain discouraging restrictions, death of the ravisher at the hand of the offended father or husband, had allowed marriage as reparation if both parents of the girl were willing.

Constantine's edict of 320/326[54] not only excluded marriage as reparation, but punished parents who consented to it with deportation. As Clyde Pharr points out, the punishment of the ravisher himself is not in the constitution as it stands, but only that of his accomplices, including the girl, and of her parents if they should consent to marriage *post eventum.* However, Constantius' exordium to his decree of 12 Nov. 349 is eloquent: "Our glorious father had ordered that vengeance be taken very harshly against ravishers. We, however, have established only capital punishment. . . ."[55]

Constantine denied the ravisher the right to appeal, indeed grants no way out to any who took part. Willing or unwilling, the girl is not going to get away with it:

> 2. If willing agreement is discovered in the girl, she shall be punished with the same severity as her ravisher. If the doors were broken by the audacity of the ravisher, the girls could have obtained the aid of neighbors by their cries and could have defended themselves by exerting all their efforts. However, We impose a lighter penalty on these girls, and We command that only the right of succession to their parents be denied them. . . .[56]
>
> 5. Participants and assistants in the crime of ravishing shall be subjected to the same punishment [as the ravisher] without any distinction of sex; and if any person apprehended in such service should be of servile condition, We order such person to be burned without any distinction of sex (*CTh* 9.24).

Punishment, decreed by Constantine, for the girl who was ravished had disappeared from the statute book, at any rate by the time of Justinian:

[49] λιθοβοληθήσονται . . . καὶ ἐξαρεῖς τὸν πονηρὸν ἐξ ὑμῶν αὐτῶν; Deut. 22:24. "Si enim ipsi raptores metu atrocitatis poenae ab huiusmodi facinore temperaverint"; *CI* 9.13.

[50] Biondi, 483.

[51] D. Liebs, "Unverhohlene Brutalität in der Gesetzen der ersten christlichen Kaiser," in *Römisches Recht in der europäischen Tradition, Symp. 75. Geburtst. Fr. Wieacker,* ed. O. Behrends, M. Diesselhorst, W. E. Voss (which I have been unable to consult).

[52] Bonini, *Ricerche,* 68.

[53] "De raptu virginum vel viduarum" of Constantine (*CTh* 9.24.1; 1 April 320; 326); Constantius (*CTh* 9.24.2; 12 November 349); Valentinian, Valens, and Gratian (*CTh* 9.24.3; 14 November 374); Justinian's edict, "De raptu virginum seu viduarum" (*CI* 9.13 of 533) and the later novel "De raptis mulieribus et quae raptoribus nubunt" (143 of 563).

Council of Ancyra 11a.314; Basil, canons 22 and 30 (canonical letters, 1–3) ann.374–5; Apost. canon 67; Chalcedon 27 a.451; In Trullo 92 a. 692. After this date both civil and ecclesiastical legislation show a perceptible shift.

[54] *CTh* 9.24.1. Desanti, "*Costantino*" (above, note 30). For date of 326 "o almeno una data successiva al 322," p. 196 note 1.

[55] "Quamvis legis prioris exstet auctoritas, qua inclytus pater noster contra raptores atrocissime iusserat vindicari, tamen nos tantummodo capitalem poenam constituimus." *CTh* 9.24, and note in C. Pharr, *The Theodosian Code* (New York, 1952; repr. 1959), p. 244, to *CTh* 9.24.1: "It is remarkable that this constitution does not prescribe the punishment of the principal who is guilty of rape [*recte* "abducting"], but only the punishment of his accomplices and assistants . . . 9.24.2 refers to this constit. and indicates that it prescribes an extremely severe punishment for ravishers." (After "accomplices and assistants," Pharr has "who are of servile origin." This is of course a slip: "Participes etiam et ministros raptoris . . . eadem poena praecipimus subiugari, *et si quis* inter haec ministeria servilis condicionis fuerit deprehensus . . . eum concremari iubemus." 1.5.

[56] "Et si voluntatis adsensio detegitur in virgine, eadem qua raptor severitate plectatur." "Neque his impunitas praestanda sit, quae rapiuntur invitae." They were probably chasing about abroad, and in any case should have defended themselves: "Cum et domi se usque ad coniunctionis diem servare potuerint et, si fores raptoris frangerentur audacia, vicinorum opem clamoribus quaerere seque omnibus tueri conatibus. Sed his poenam leviorem inponimus, solamque eis parentum negari successionem praecipimus."

> If the girl is unmarried, she may be joined in lawful matrimony with anyone except the ravisher. His confiscated property will supply a dowry. If she prefers *in sua pudicitia remanere,* she is free to do so. No one, judge or other, shall dare to disregard this [ruling]. A ravished virgin or widow or any other ravished woman whatsoever is forbidden to marry her ravisher. . . . [57]

With this one exception, Justinian is no less harsh:

> We decree that ravishers . . . are to suffer capital punishment. . . . We ordain by this general constitution that those who commit such a crime . . . where they are caught red-handed and taken in flagrant [perpetration] of the crime by the parents of the virgins or widows etc., if proved guilty, they should on the spot be put to death.

Should the ravisher get away, the whole empire is to be mobilized:

> Sin autem post commissum tam detestabile crimen aut potentatu raptor se defendere aut fuga evadere potuerit, in hac quidem regia urbe tam viri excelsi praefecti praetorio quam vir gloriosiss. praef. urbis, in provinciis autem tam viri eminentiss. praef. praet. per Illyricum et Africam quam mag. mil. per diversas nostri orbis regiones nec non viri spect. praef. Aegypti vel comes Orient. et vicarii etc. simile studium cum magna sollicitudine adhibeant, ut eos possint comprehendere et comprehensos in tali crimine post legitimas et iuri cognitas probationes sine fori praescriptione durissimis poenis adficiant et mortis condemnent supplicio (Krüger-Mommsen 13.1c).

Right of appeal is denied him: "Quibus et si appellare voluerint, nullam damus licentiam secundum antiquae Constantinianae legis definitionem" (13.1d).

Capital punishment and confiscation of their goods are not for the ravisher alone, but for his accomplices too:

> Poenas autem quas praediximus, id est mortis et bonorum amissionis, non tantum adversus raptores, sed etiam contra eos qui hos comitati in ipsa invasione et rapina fuerint constituimus (13.3).
>
> Ceteros autem omnes, qui conscii et ministri . . . reperti et convicti fuerint vel eos susceperint vel quamcumque opem eis intulerint, sive masculi sive feminae sunt, cuiuscumque condicionis vel gradus vel dignitatis, poenae tantummodo capitali subicimus (13.3a).

Should they include any of servile condition, they are sent to the stake: "Et si quis inter haec ministeria servilis condicionis fuerit deprehensus, citra sexus discretionem eum concremari iubemus" (13, 4).

The ravished woman may not marry her ravisher: "Nec sit facultas raptae virgini vel viduae vel cuilibet mulieri raptorem suum sibi maritum exposcere" (13.2).

Punishment of parents who try to avoid prosecution of the ravisher is maintained: "Parentibus, quorum maxime vindicta intererat, si patientiam praebuerint ac dolorem remiserint, deportatione plectendis" (13.3c).

Disorder and contempt of the law, particularly when committed by men in bands, and, above all, by slaves, is the target of the successive legislators. The Isaurian *Ecloga* marks a break, neither, apparently, condemning the culprit to death nor forbidding his marriage to the abducted girl: Ὁ ἁρπάζων μονάστριαν ἢ καὶ παρθένον βιωτικὴν ἐξ οἱουδήποτε τόπου, ἐὰν διαφθείρει αὐτὴν ῥινοκοπείσθω· οἱ δὲ τῇ τοιαύτῃ ἁρπαγῇ συντρέχοντες ἐξοριζέσθωσαν (*Ecloga* 17.24). An innovation of the *Ecloga* (maintained in the Macedonian legislation) consists in the separate treatment of abduction and adultery (17.27). The former does not seem to be taken very seriously. If there has not been seduction there is nothing, apparently, to prevent a settlement by marriage, in the pre-Christian style, if that solution is chosen by all parties (a solution which, one can hardly doubt, must often have been managed, even when the law forbade it, as in the famous case of Digenis[58]). No penalty is laid down for consenting parents.

It seems unlikely, however, that this law would cover ravishing by an armed band, and a main feature of the *Procheiros nomos* and the *Eisagoge* is the difference made between armed and unarmed abduction: "If the abduction has taken place with the help of arms, viz. swords or cudgels," the ravisher is to be punished by the sword. "But if the abduction was carried out without the use of any arms," he will lose his hand. Proportionate punishment is sought for his accomplices.[59] It seems likely that

[57] "Et si non nuptae mulieres alio cuilibet praeter raptorem legitime coniungentur, in dotem liberarum mulierum easdem res vel quantas ex his voluerint prodedere, sive maritum nolentes accipere in sua pudicitia remanere voluerint, pleno dominio eis sancimus applicari, nemine iudice vel alia quacumque persona haec audente contemnere." *CI* 14.13.1.1*g*.

[58] M. Angold, "The Wedding of Digenis Akrites: Love and Marriage in Byzantium," in *Acts of the 1st International Symposium* Καθημερινὴ ζωὴ στὸ βυζάντιο, Delphi, 1988 (Athens, 1989), 211 and passim.

[59] εἰ μὲν μεθ' ὅπλων ἤτοι ξίφων ἢ ῥοπάλων τὴν ἁρπαγὴν ἐποιήσαντο, οἱ τοιοῦτοι ξίφει τιμωρείσθωσαν. οἱ δὲ συνυπουργοῦντες αὐτοῖς ἢ συνειδότες ἢ ἑκόντες ὑποδεξάμενοι ἢ οἱανδήποτε σπουδὴν εἰσενεγκόντες, τυπτόμενοι καὶ κουρευόμενοι ῥινοκοπείσθωσαν. εἰ δὲ χωρὶς οἱωνδήποτε ὅπλων τὴν ἁρπαγὴν ἐποιήσαντο, ὁ μὲν τὴν ἁρπαγὴν ποιήσας χειροκοπείσθω, οἱ δὲ βοηθήσαντες . . . ἢ συνειδότες καὶ ὑπηρετήσαντες ἢ ἑκόντες ὑποδεξάμενοι ἢ οἱανδήποτε σπουδὴν εἰσενεγκόντες, τυπτόμενοι

this is codification of practice. Neither text includes married women: "those who ravish a woman ἢ μεμνηστευμένην ἢ ἀμνήστευτον ἢ χήραν, εἴτε εὐγενής ἐστιν εἴτε δούλη ἢ ἀπελευθέρα, καὶ μάλιστα εἰ τῷ Θεῷ εἰσὶ γυναῖκες καθιερωμέναι (*Procheiros nomos* 40.40). Adultery is not included, here or in the same paragraph of the *Eisagoge*.

Punishment appears to be harsher than in the *Ecloga:* if the ravisher was armed, the penalty is death, and those who have given him assistance in any form or knew his purpose have their nose cut off and are beaten and shaved. If he was unarmed, he loses his hand, and those with him are beaten, shaved, and exiled.

Novel 35 of Leo VI begins by contrasting the beneficial severity of the civil legislation with the dangerous indulgence of the canon: . . . ἐπείπερ εἴδομεν τῇ τοῦ ἱεροῦ συμπαθείᾳ νόμου ὥσπερ ἀναιδευόμενον τὸ κακόν, τῇ δὲ τοῦ πολιτικοῦ νόμου αὐστηρίᾳ καταστελλόμενον, διὰ τοῦτο τῆς μᾶλλον ἐπαμυνοῦσης τῇ καταστάσει τῶν πραγμάτων ἐγενόμεθα προνοίας.[60] Paraphrases follow, first of Justinian's legislation (. . . ταῦτα μὲν ἐδόκει τοῖς πάλαι) and then of that of "Our father of eternal memory,"[61] which, along with the financial penalties of the ἀρχῆθεν νομοθεσία (Justinian), are retained ἐν τῷ παρόντι καιρῷ καὶ ἐν τῷ εἰς ἔπειτα.

To what extent all this was ever put into practice is of course impossible to know. A great many cases, probably most, went no further than the bishop's court. The data in general suggest this. But even if they reached the civil court, judges exercised their discretion. When Constantius II lightened the ravisher's penalty he gave a reason that seems relevant: "ne sub specie atrocioris iudicii aliqua in ulciscendo crimine dilatio nasceretur" (*CTh* 9.24.2). Justinian's novel 74 (see above, p. 137 ff) concerning προσελεύσεις γινομέναι ἡμῖν ἀεὶ συχνότερον γυναικῶν ὀδυρομένων καὶ προσαγγελουσῶν, ὥς τινες . . . ταύτας ἀνάγουσιν οἶκοι . . . is perhaps the most striking piece of evidence. Many, if not most, are witnessing to ἁρπαγή. Not only does it occur, and not always end happily, but some of the girls later seek aid from the law. Justinian says, exaggerating probably, that he is constantly besieged by them. If they can prove their case, the abductor is condemned, not *capitis supplicio,* but to taking the woman back. The evidence suggests that the harshness of the legislation inaugurated by Constantine and largely maintained by Justinian was from the start evaded in practice, and that less harsh laws took their place, so that when one Seth with his accomplices were, apparently, condemned, in the twelfth century presumably, to the full rigors of the law for ravishing a girl, one must conclude the defense was inefficient. Balsamon, our only source for the case, comments:

> But if you want to say the woman was not really ravished, that it was an excuse she made . . . neither [ecclesiastical] penalties will apply nor the [civil] law punishing ravishers. Those who have carried off girls under paternal authority will only be charged with ὕβρις toward the father (Balsamon to Basil 30).

Everything hung on shifting the offense from the realm of public to that of private violence.[62]

Eustathios Rhomaios had, about a century and half earlier, used ὕβρις toward the girl's father as a means of dodging a more punitive law (not ravishing but seducing a freeborn girl and then refusing to marry her).[63] He will hardly have been the first to recognize this legal way out of a legal corner; this was the accepted way of handling the law. Emperor Alexios I proceeded no differently with his novel 24 (see below). Balsamon's two refrains are: "Different interpretations are current" and "Do not imagine these two laws are in contradiction" (in fact, they sometimes are not).[64] Case histories, unfortunately, are extremely rare, but the indepen-

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καὶ κουρευόμενοι ἐξοριζέσθωσαν. *Procheiros nomos* (Constantine Harmenopoulos), Πρόχειρον νόμων ἢ ἑξάβιβλος, ed. K. G. Pitsakes (Athens, 1971), 40.40.

[60] *Les novelles de Léon VI le Sage,* ed. P. Noailles and A. Dain (Paris, 1944), p. 141.

[61] μετὰ μὲν ὅπλων . . . ἀναιρετικῶν τῆς ἁρπαγῆς γενομένης, ξίφει τιμωρεῖσθαι τὸν βιασάμενον, ὡς δι' ὧν μεθ' ὅπλων ἐπὶ τὴν πρᾶξιν ἐχώρησεν οὐκ ὄντος αὐτοῦ καὶ μιαιφονίας ἀθώου· τοὺς δὲ συνεπειλημμένους ἢ συνειδότας ἢ συνεισάγοντας σπουδὴν ῥινὸς ἐκτομῇ καὶ μάστιξι καὶ κουρείᾳ τῇ ἐν χρῷ τιμωρεῖσθαι. Ὅπλων δὲ μὴ συμπαρόντων τῇ βίᾳ, μὴ μέχρι φόνου τὴν δίκην ὡρᾶν ὡς οὐδὲ τῆς μιαιφονίας χώραν ἐχούσης, ἀλλὰ τὸν μὲν αὐθέντην τῆς ἁρπαγῆς εἰς χειρὸς κινδυνεύειν ἀποκοπήν, τοὺς δὲ συνυπουργησαμένους ἢ κοινωνήσαντας ἄλλως μάστιξι καὶ κουρείᾳ καὶ ὑπερορίᾳ τὴν δίκην εἰσπράττεσθαι.

Eisagoge 40.45; *Procheiros nomos* 39.40. For the chronological relationship between the three collections, see N. Oikonomides, "Leo VI's Legislation of 907 Forbidding Fourth Marriages: An Interpolation in the *Procheiros Nomos,*" *DOP* 30 (1976), 173–93, in particular pp. 185ff and note 48; Sp. Troianos, Οἱ πηγὲς τοῦ βυζαντινοῦ δικαίου. Εἰσαγωγικὸ βοήθημα (Athens, 1986) (hereafter Troianos), 96–97, 100–101, 103–5.

[62] *Peira:* Ὅτι κινουμένη ἡ ἰδιωτικὴ βία οὐ σβέννυοι τὴν ἐγκληματικὴν ἀλλὰ συναναφαινομένην αὐτῇ ἔχει καὶ τὴν πουβλίκαν. ὁ οὖν πραίτωρ θέλων μετρῆσαι τὰς ποινὰς ἐξεῦρεν διὰ ταῦτα ἀγωγήν, τὴν λεγομένην ῥωμαϊστὶ βὶ βονόρουμ ῥαπτόρουμ· αὕτη οὖν κινουμένη ἐπὶ τῆς βίας σβέννυσι καὶ τὸ ἐγγλημα-τικόν, τουτέστι τὸ δημόσιον ἔγγλημα. 42 (Περὶ τῶν ἀπὸ φόβου καὶ βίας ἁμαρτημάτων καὶ πάσης βίας κτλ. 2).

[63] *Peira* 49.4. Oikonomides, "The 'Peira'" (above, note 14), 184.

[64] Cf. note 8 above.

dence judges might show emerges when the emperors Leo and Majorian, in 459, express their displeasure at the leniency shown by the *consularis* of suburbicarian Tuscany, who had substituted relegation for execution in a case of adultery. The affair might never have come to the imperial ears, had not the culprit, rather inconsiderately, escaped. The unfortunate *consularis* reported what had happened and the emperors wrote bleakly:

> . . . ut relatione testaris, convictum confessumque Ambrosium in nefario crimine relegatione dignum temporaria censuisti. Non solum leniter, immo negligenter . . . elabi vita superstite iudicares. Eum tamen ipsum temerasse sententiam et confestim locum perhibes exilii defugisse nosque consuluisti, quid fieri sanceamus (*CTh* Maior. 9).[65]

If Ambrosius had not escaped, Leo and Majorian Augusti would never have known nor been prompted to send this instructive rescript.

We glimpse this case in the setting of the civil courts. The approach of ecclesiastical courts is suggested by a patriarchal tome on marriage, in which items of canon and civil law stand side by side. It is of an altogether different date, 1081, slightly later than Eustathios Rhomaios, and gives the civil law definition of ἁρπαγή in much the same terms as his.[66] The civil law penalty is not specified, but the requirements of St. Basil's canon 22 are: "He who has married a woman after carrying her off must first, if she is engaged, restore her to the man she is engaged to, who may keep her or give her her liberty. If she is not engaged, he must restore her to her parents whose consent is necessary for there to be marriage." The collection appears practical rather than theoretical and suggests that canon law is considered the norm. Two other cases are found in the *Régestes* (nos. 832, 1192, and 1193). The source for the first[67] is a reply from the synod of Constantinople under Alexios Stoudites (1025–43) to Theophanes of Thessalonica who had asked, among other things, whether the engagement between the daughter of the chartularios Theodore of the Karmalikioi and the son of Basil, surnamed Kalos Kairos, was annulled, the girl having been carried off by one of Basil's relations. The answer is to the effect that the engagement holds if the abduction was not followed by sex. If it was, the marriage is forbidden. What is actually happening is anything but clear. Only use of the word ἁρπαγή puts it in that class rather than in "seduction" as defined by Romanos; it is not therefore even an assured case of breakdown of the civil legislation.

The other, occurring a good century and a half later, also known from a synodic letter, is much more instructive. Dated February 1199, addressed by John, archbishop of Constantinople, to the metropolitan of Dyrrachium and the bishop of Devol, it runs:

> Capandrites Alexios presented himself before the synod in February last year . . . , under our predecessor, and stated that he had been joined in lawful matrimony with Eudokia of the theme of Dyrrachium, sister of the pansebastos sebastos, k. Constantine tou Boïoannou, who had lost her first husband, the late Dyrrachium archont, Bardas Macrommatos. There had been the usual marriage contract (γαμικὰ συνήθη συμβόλαια). Besides this, both betrothal and wedding had been blessed. Seven months after their marriage, the aforementioned sebastos Boïoannes made pretense of inviting him, Capandrites, and his lawfully wedded wife, who was also [Boïoannes'] sister, as has been said, to his house for a family meal. When they reached the house, he [Capandrites] had been secured with iron chains and imprisoned, his wife taken from him, as well as everything he had brought with him. His wife had been, against her will, forcibly married to another.
>
> After this statement, he further produced a *sēmeiōma* from you, bishop of Devol, to the effect that, with the agreement of Coloneia archonts whose names appeared in the *sēmeiōma,* this their relative, Capandrites, deprived by death of his first wife, had been joined in second marriage, without any exercise of violence, to the aforementioned woman. And he even produced an imperial worshipful *prostagma* specifying that if said Eudokia had, without exercise of violence, been joined to him by holy rites, no one should dare to oppose any impediment to the said Capandrites.
>
> In view of all this, a *sēmeiōma* was issued with the decision Capandrites had asked for, decreeing what should be done. In this *sēmeiōma* also, the documents produced, as we said, by Capandrites, viz. the imperial worshipful *prostagma* and the *sēmeiōma* from you, bishop of Devol, were copied verbatim.

Eudokia's version follows. It had been transmitted in her name to the patriarch and synod, with a request to know where her case stood:

> But now it is reported to us on behalf of the said woman, viz. the sister of the pansebastos Boïoannes, that after her former lawful husband, the late primikerios Bardas Makrommatos, paid the debt of nature, fearing some highhanded move on the part of officialdom (πρακτορικὴν δυναστείαν), common in these circumstances, she moved provisionally to the theme of Coloneia to the house of a relation, taking with her all the valuables and movables she could. But Capan-

[65] *CTh,* p. 175.
[66] *Peira* 63: Περὶ ἁρπαγῆς, § 5.
[67] *Régestes,* no. 919 an. 1081, § 7.

drites, having collected a good-sized band of armed men, had come on her as a brigand and, after criminally carrying her off (ἁρπαγὴν αὐτῆς ἐπλημμέλησεν), taking all her possessions too, he moved her from place to place, dragging her about as a captive wherever he wanted, not even allowing her to see her sisters who had come looking for her. In this unlawful manner, by the use of force, he had married her without her consent. [This she refused] both because of the outrageous nature of the deed itself, and also because she knew full well that the former wife of this Capandrites, whom he had lost through death, was a second cousin [of hers]. Therefore she had seized an opportunity to escape so as not consciously to burden her soul with a crime by living with him.[68]

The synod had, still according to the same synodic letter, replied that:

If this was the truth, by its very nature a marriage so contracted is automatically invalid (αὐτόθεν ἔχει τὸ διεσπασμένον). And he who has committed this violence fully deserves to suffer what the sacred and pious laws [the imperial laws] lay down, while submitting also to the penalties prescribed in the holy canons for those who have knowingly married two second cousins, which is the sixth degree of consanguinity. But she who removed herself from him for these reasons suffers no prejudice.

The *sēmeiōma* continues with instructions to the metropolitan of Dyrrachium to summon both parties, examine closely, in the presence of both, the account given by each to the synod, and on whichever side the truth appears, to carry out the relevant synodic decision.

Unfortunately the Dyrrachium synod's findings are lost, so we do not know who best defended his or her story. This is nonetheless a rewarding document: Eudokia's tale is more convincing, if only because Capandrites is there with certificates of nonviolence before he is accused of having used any. But even if it is not true, it was likely enough for the bishop of Devol to submit her case to the eparchy synod, and for that authority to forward it to Constantinople, to the *endēmousa.* It was apparently normal that the primikerios' widow and sister of the pansebastos sebastos should have feared some highhanded move on the part of officialdom, "common," says the synodic letter, "in these circumstances," whether quoting or by way of commentary is not clear. At all events, she was uneasy enough to move, if only provisionally, from the region of Devol to the theme of Coloneia—only to come up against Capandrites and the Coloneia archonts. In short, the context of the ἁρπαγή legislation becomes visible.[69]

II. Μνηστεῖαι

In April 1066 the synod presided over by the patriarch and former nomophylax John VIII Xiphilinos declared the binding nature of engagement to be equal to that of marriage, even if there had been no blessing,[70] and this was incorporated into the civil legislation by a chrysobull of Nikephoros Botaneiates dated January 1080. The relationship with it of novel 24 of Alexios I Kommenos (1081–1118) is more complex, as will be seen below.

How did this grow out of Roman law, where engagement had no more binding nature than any other private contract? The *Digest* gives Florentinus' definition: "Sponsalia sunt mentio et repromissio nuptiarum futurarum," a contract that can, as Diocletian and Maximian make clear, be resiliated: "Alii desponsata renuntiare condicioni ac nubere alii non prohibetur" (*CI* 5.1.1).

"There are two aspects to Justinian's legislation," says Herman: "The one looks back to the past . . . but the other to the future. . . . So it is with engagement. On the one hand Justinian emphasizes its informal character, as in classical law. Engagement is entered upon without any legal formality. . . . '*Ulpianus:* Sufficit nudus consensus ad constituenda sponsalia. 1 Denique constat et absenti absentem desponderi posse, et hoc cottidie fieri' (*Dig* 23.1.4). . . . But alongside this concept we find . . . norms that spring from a totally different legal outlook."[71] To this second, unclassical, aspect belong the *arrhae*—that were to assume such importance in Byzantine law that the verb ἀρραβωνιάζω became the term for "getting engaged"—as well as the whole legal concept of *justae causae* for breaking off an engagement.[72] This other law Herman terms "oriental;" and the oriental origin has been

[68] *Régestes,* nos. 1192 (see following), 1193 (synodic decision reversing earlier one under George II Xiphilinos [1191–98], notified by John Kamateros, patriarch of Constantinople [1198–1206], to the metropolitan of Dyrrachium), in PG 119, cols. 890–93.

Capandrites' case also raises the question of degrees of consanguinity; for this aspect see Pitsakes, p. 321; Darrouzès, "Questions" (above, note 11), 115.

[69] See also *Peira* 63.

[70] *Régestes,* nos. 896, 897, under John VIII Xiphilinos (1064–75); no. 915 under Kosmas I (1075–81), "Requête synod. à l'emp. Nicéphore Botaniate pour qu'il approuve le tome de Jean Xiphilinos sur les fiançailles." No. 1029 under Nicholas IV Mouzalon (1147–51): "Le cas ayant été discuté en synode . . . les fiançailles ne tiennent point lieu de mariage parfait."

[71] E. Herman, "Die Schließung der Verlöbnisse im Recht Justinians und der späteren byzantinischen Gesetzgebung," in *AnalGreg* 8 (1935), 79–107, here 79–80.

[72] Contrast Diocletian and Maximian (a. 293) quoted above: "Alii desponsata renuntiare . . . iustae causae": see below.

very searchingly investigated, notably by Paul Koschaker and, a little later, Edoardo Volterra.[73] The Jewish factor of "oriental" is recognized, but there is one aspect that could be looked into more closely, with the part played by choice of a particular term in the development of the concept, and the contrast between the verbal equivalence *marašah*-μεμνηστευμένη and the concepts attached to each.

This takes us back to the canons on ἁρπαγή. The girl carried off is unmarried, but she is defined as either engaged to another man[74] or without ties, σχολάζουσα. If the parents of the girl who is not engaged agree and she is willing, the marriage can be recognized. The affianced girl, however, may not marry her ravisher, however willing she may be. Leaving aside, for the moment, the remarkable ban laid by civil law on the marriage, even if the girl carried off was the ravisher's betrothed, we must first look at the distinction between "engaged" and "free," though it is in fact important in canon law only.

The division originated in Mosaic law, which, though abolished by the Gospel, continued less, no doubt, to serve as a model than to fulfill a validating function.[75] When the fathers, whether in synod or as individuals, a Basil or a Gregory in letters that were given canonical status early in the fifth century, legislated on marriage, they gave authority to their decisions by making them the New Deuteronomy.

This dependence was examined above in the cases of Ancyra 11 and Apostles 67. Basil's canon 22 is more highly developed than either and more formally parallel to the Deut. 22:23 legislation—for rape, since the requisite sin was not available. The insistence on μνηστεία, the details of Basil's handling of the matter, and the three cases distinguished, all come from Deuteronomy, the more obviously so as, in the canon, the distinction between "willing" and "unwilling" is purely formal and only explicable as taken over from a source, whereas in Deuteronomy it is of prime importance. The correspondence appears clearly when the texts are compared:

[Deut. 22:23] Ἐὰν δὲ γένηται παῖς παρθένος *μεμνηστευμένη* ἀνδρὶ καὶ εὑρὼν αὐτὴν ἄνθρωπος[76]

[Basil 22] Τοὺς ἐξ ἁρπαγῆς ἔχοντας γυναῖκας (1) εἰ μὲν ἄλλοις *προμεμνηστευμένας* εἶεν ἀφῃρημένοι, οὐ πρότερον χρὴ παραδέχεσθαι πρὶν ἢ ἀφελέσθαι αὐτῶν καὶ ἐπ᾽ ἐξουσίᾳ τῶν ἐξαρχῆς μεμνηστευμένων ποιῆσαι, εἴτε βούλοιντο λαβεῖν αὐτὰς εἴτε ἀποστῆναι.

[Deut. 22:24] *ἐν πόλει* . . . ἐὰν δὲ *ἐν πεδίῳ* εὕρῃ τὴν παῖδα . . .

[Basil] 22] Τὸν μέντοι ἐκ διαφορᾶς εἴτε *λαθραίας* εἴτε *βιαιοτέρας* γυναῖκα ἔχοντα

That ἐν πόλει stands for "willing" and ἐν πεδίῳ for "forced" was obvious anyway, but is made explicit: οὐκ ἐβόησεν ἐν τῇ πόλει (Deut. 22:24): she did not wish to be rescued. But in the wild "the engaged girl cried for help and there was none to help her": she is innocent. Basil's less dramatic terms have the same meaning: the carrying off was λαθραία if the girl didn't cry for help (Blastares: συμφθαρεὶς γυναικί, εἶτ᾽ οὖν λαθραίως ἑκούση, εἶτ᾽ οὖν βιασάμενος . . . [77]).

[Deut.] Ἐὰν δέ τις εὕρῃ τὴν παῖδα τὴν παρθένον, ἥτις *οὐ μεμνήστευται* . . . δώσει ὁ ἄνθρωπος . . . τῷ πατρὶ τῆς νεάνιδ. ν΄ δίδρ. ἀργ., καὶ αὐτοῦ ἔσται γυνή . . . οὐ δυνήσεται ἐξαποστεῖλαι αὐτ. τὸν ἅπαντα χρόνον.

[Basil 22] (2) εἰ δὲ *σχολάζουσάν* τις λάβῃ, ἀφαιρεῖσθαι μὲν δεῖ, καὶ τοῖς οἰκείοις ἀποκαθιστᾷν, ἐπιτρέπειν δὲ τῇ γνώμῃ τῶν οἰκείων . . . κἂν μὲν ἕλωνται αὐτῷ παραδοῦναι, ἵστασθαι τὸ συνοικέσιον. ἐὰν δὲ ἀνανεύσωσι, μὴ βιάζεσθαι.

Ἁρπαγή in canon 22, as rape in Deuteronomy, is divided into three categories, according to whether or not the girl was engaged and, in the former case, whether or not she was willing. In Deuteronomy her fate hangs on the distinction. If she was willing she was to die by stoning, if engaged no less than if married. Her penance is not even mentioned by Basil.[78] Yet her fate, too, depends on her being engaged or not. If she was, she is restored to the man to whom she was engaged: she is as tightly bound by μνηστεία as by marriage.

The text raises another question. When Basil rules that a girl who is not married but only engaged should be placed ἐπ᾽ ἐξουσίᾳ of the man she

[73] Ritzer, 22. P. Koschaker, "Zur Geschichte der arrha sponsalicia," *ZSav* 33 (1912), 383–416. E. Volterra, "Studio sull'arra sponsalicia," *Rivista italiana per le scienze giuridiche,* n.s. 2 (1927), 581–680; 4 (1929), 3–33; 5 (1930), 155–254.

[74] Reference in Macedonian law to "ravishers of their own μεμνηστευμένη:" *Eisagoge* 40.45; Zepos, *Jus,* 2, p. 363, 3; *Procheiros nomos* 40, Zepos, *Jus,* 2, p. 220, 18 (κἂν τὴν ἰδίαν τις . . .).

[75] A text such as the Μωσαϊκὸ Παράγγελμα or Ἐκλογὴ τοῦ παρὰ Θεοῦ διὰ τοῦ Μωσέως δοθέντος νόμου τοῖς Ἰσραηλίταις 72 elaborated the parallelism at length: *Fontes Juris Romani antejustiniani,* ed. S. Riccobono et al., Pars altera (Florence, 1940), *XVIII.* Troianos (p. 79) recognizes that the idea was to demonstrate historical continuity between the canons and Moses, the lawgiver *par excellence.*

[76] Deut. 22:23 ff.

[77] Σύνταγμα Α΄ ιγ΄, Rhalles and Potles VI (1859), p. 101.

[78] Though Basil frequently assumes the penance to be known, here it is more likely that Amphilochios was dealing with a male penitent, and had put no question about the woman in the case.

was first engaged to, this presumably means that it is up to him to abide by the engagement or not, as he wishes (εἴτε βούλοιντο λαβεῖν αὐτὰς εἴτε ἀποστῆναι), but it could be taken to mean that she was to be handed over to him, and, whichever Basil may have meant, it seems likely, in fact, that both interpretations were current.

This brings us to another text of Judaic origin well placed to color the whole concept of μνηστεία:[79] Ἀνέβη δὲ καὶ Ἰωσὴφ ἀπὸ τῆς Γαλιλαίας . . . εἰς . . . Βηθλέεμ . . . ἀπογράψασθαι σὺν Μαριὰμ τῇ ἐμνηστευμένῃ αὐτῷ, οὔσῃ ἐγκύῳ (Luke 2:4–5). For the word relevant to this study, ἐμνηστευμένη, the tradition is not absolutely constant (and this is perhaps no accident).[80] It is, however, characteristic of the Constantinople text of the New Testament. Patristic comment is also witness and no less significant. The following passages from Origen and Romanos show not only that ἐμνηστευμένη was the text with which they were familiar, but that it was thought-provoking and that the question of "reproach" had to be answered:

> . . . the angel Gabriel was sent by God to a virgin betrothed to a man whose name was Joseph and the virgin's name was Mary. Revolving this yet again in my mind, I ask why God, once he had announced the Savior was to be born of a virgin, chose a girl already betrothed. Unless I am mistaken, the reason is this. He had to be born of a virgin who not only was betrothed, but, as Matthew writes, who was already in [her betrothed's] keeping, even if he did not yet know her, lest the very form of virginity appear shameful, if the virgin was seen to have a swollen belly.[81]

Romanos, X. *La Nativité* (I), str. 10:

ἔφριξαν, ὅτι εἶδοσαν
τὴν τούτου μητέρα, τὸν ταύτης μνηστῆρα,
καὶ φόβῳ εἶπον· Οὗτος υἱός ἐστιν ἀγενεαλόγητος;
Καὶ πῶς, παρθένε, τὸν μνηστευσάμενον
βλέπομεν ἀκμὴν ἔνδον τοῦ οἴκου σου;
Οὐκ ἔσχε μῶμον ἡ κύησις σου·
μὴ ἡ κατοίκησις ψεχθῇ συνόντος σοι τοῦ Ἰωσήφ.

Ibid., XII. *La Nativité* (III), str. 10:

> ὁ νῦν θαλάμοις ἔχων με ὡς μνηστήρ, οὐκ (sic) ὡς ἀνήρ.

In 692, in its canon 98, the synod in Trullo gave formal expression to the implications, in Christian eyes, of an engagement that Deuteronomy made it death to break, while in the Gospel it went with cohabitation: "He who marries the engaged bride of another man so long as that other lives, commits adultery."[82]

But at the same time engagement was governed by civil law, and continued to be. The *Digest* definition (above, p. 144), became, in the *Procheiros nomos* 1.1: Μνηστεία ἐστὶ μνήμη καὶ ἐπαγγελία τῶν μελλόντων γάμων. There are certain conditions laid down, one particularly relevant to this study: "Only those who realize what is happening can validly get engaged, viz. [they must be] at least seven."[83] This is the *Digest,* whose formulation reappears in the Macedonian legislation. In the *Ecloga,* Florentinus' concise formula[84] is replaced by an account of "Christian engagement" as actually practiced:

> Christian engagement is entered into by children seven years old and older. It springs from the wish of the engaged and the consent of their parents and relations. If they are not in a forbidden relationship, lawful engagement [is contracted] by pledges or *hypobola* or by a deed in writing. If the party that deposited the pledge decides to break the engagement and not fulfill it, he forfeits the deposit. If it is the wish of the girl's side to break, they must pay back double, viz. the pledge itself plus its value in addition.[85]

In spite of the specification that it is Christian, the contract is still that of classical law, unaffected

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[79] Ritzer, 22.

[80] Luke 2:4–5: *apparatus criticus* of the Nestle-Aland *Novum Testamentum graece*[25] (reprint of *N.T.G.*,[13] *neu bearb. Aufl.*, 1927) "omnes vel plerique codd. vers. vet. lat" as well as the *Sinaiticus* have γυναικι αυτου. The *Koine,* however, "vel recensio postea Antiochae et CP orta" and the *Textus Caesareensis* have μεμν αυτω γυναικί.

[81] Origen, *Homily VI, on St. Luke* (preserved in Jerome's version): ". . . quod . . . missus sit angelus Gabriel a Deo . . . ad virginem desponsatam viro, cui nomen Ioseph . . . et nomen virginis Maria. Rursum in mea mente volvens quaero, quare Deus, cum semel Salvatorem indicaret nasci ex virgine, non elegerit puellam absque sponso, sed eam potissimum, quae iam fuerat desponsata. Et nisi fallor, haec causa est: Debuit de ea virgine nasci, quae non solum sponsum haberet, sed, ut Matthaeus scribit, iam viro tradita fuerat, licet eam vir necdum nosset, ne turpitudinem virginis habitus ipse monstraret, si virgo videretur utero tumenti."

[82] Ὁ ἑτέρῳ μνηστευθεῖσαν γυναῖκα, ἔτι τοῦ μνηστευσαμένου ζῶντος, πρὸς γάμου κοινωνίαν ἀγόμενος, τῷ τῆς μοιχείας ὑποκείσθω ἐγκλήματι.

[83] *Dig* 23.1.14; *Procheiros nomos,* 1.8: Ὁ τὸ γινόμενον νοῶν καλῶς μνηστεύεται, τουτέστιν ὁ μὴ ὢν ἧττον τῶν ζ' ἐτῶν.

[84] See above, p. 144.

[85] Συνίσταται μνηστεία χριστιανῶν ἐπὶ τοῖς ἐν πρώτῃ ἡλικίᾳ ἀπὸ ἑπταετοῦς χρόνου καὶ τὴν ἄνω ἔκ τε τῆς τῶν μνηστευομένων ἀρεσκείας καὶ τῆς ἐκ γονέων καὶ συγγενῶν αὐτῶν συναινέσεως, ἐὰν οἱ συναλλάσσοντες νομίμως συναλλάσσωσι καὶ μὴ ὦσιν ἐκ τῶν κεκωλυμένων, τουτέστι δι' ἀρραβώνων ἤγουν ὑποβόλων ἢ δι' ἐγγράφων. εἰ δὲ δόξει τὸν διδόντα τὸν ἀρραβῶνα διαστρέψαι καὶ μὴ συναλλάξαι, ἀπόλλειν αὐτὸν τὸν ἀρραβῶνα. εἰ δὲ τὸ μέρος τῆς κόρης θελήσει διαστρέψαι, παρεχέτω διπλοῦν τὸν ἀρραβῶνα, τουτέστιν αὐτὸν τὸν ἀρραβῶνα καὶ ἄλλον τοσοῦτον. *Ecloga* 1.1, p. 168.

ἔκ τε τῆς τῶν μνηστευομένων ἀρεσκείας two views were held, in particular with respect to the girl. Ὁσάκις γάμος ἔννομος

by In Trullo 98. There is not much evidence before Leo VI on the balance, in practice, between civil and ecclesiastical legislation for marriage (with particular reference, in this paper, to In Trullo 98). "Custom," that is to say civil law, seems likely to have prevailed more or less up to the point consigned by the novel, but blessing of the engagement had also become custom, and the requirement that marriage and engagement be "Christian" had become firmly entrenched in the public mind. In this context the rigorists were building up their position. A recognizable factor of evolution is constituted by royal marriage scandals, habitually solved by concessions to the champions of rigor. Without the source blackout of the Iconoclast period this would probably be even clearer.

"Custom" or "the old law" undoubtedly suited most Byzantine parents: the children safely settled for life, as soon as possible, by a contract the other side could only break if they paid compensation. In most cases it probably worked. The children played together and were good friends, if not more, when the time came for the concluding contract. Of course only a hint is found, here and there, of the failures. These took two forms. The marriage might be formalized and result in extreme distress. Eustathios Rhomaios, in one case that came before him, after hearing the girl express her loathing, and the evidence of the midwives who had examined her, condemned her husband for rape.[86] On the other hand, if one of the young couple died or the engagement, for whatever reason, was broken off, the survivor or survivors were in danger of being reminded that if they married they were committing adultery; that, in addition to any other drawbacks, put obstacles in the way of marriage to another person.

The civil law, at the end of the ninth century, tried to come to their assistance: novels 74 and 109 of Leo VI, while confirming seven as the legal age for engagement, forbid religious rites before "his fifteenth year for the man, her thirteenth for the woman." In the first of the novels, Leo gives as his aim eliminating the contradiction between the In Trullo decision[87] and the civil law, giving a summary indicative of what was actually happening:

> Since there appears to be a contradiction between the decisions concerning marriage of the . . . sixth synod, set forth in its ninety-eighth canon, and the civil law—for the former utterly forbids the girl who has been engaged, as long as the man she was engaged to lives, to marry another, calling such union adultery. Civil law does not hold such ruptures to be properly labeled by the name of so great a crime, and restricts responsibility to the payment of *arrhae* and penalties, so long as they were old enough to be married when the customary blessing was pronounced. Since, therefore, a discerning reason recognizes that it is here the contradiction really resides, and that the true breaking of an engagement is separating after it has been blessed[88]—we decree that the religious rites are not to take place before the lawful age for marriage, for men the fifteenth year, for women the thirteenth.

Novel 109 merely repeats the same disposition:

> Following the Ancients, who, well aware of the question, legislated that engagements contracted before [the parties] were seven were not valid, We too decree that engagements are in no way to be contracted before the age of seven, nor may they be confirmed by

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γίνεται, ἀναγκαία ἐστὶ καὶ ἡ συναίνεσις τῶν μελλόντων συζευχθῆναι.

The *Procheiros nomos* quotes the rule with only verbal differences and then elaborates: ὡς ἐπὶ τῶν γάμων οὕτως καὶ ἐπὶ τῆς μνηστείας οἱ συναπτόμενοι συναινοῦσιν· δεῖ οὖν καὶ τὴν ὑπεξουσίαν συναινεῖν. δοκεῖ δὲ τῷ πατρὶ συναινεῖν ἡ μὴ ἀντιλέγουσα. τότε δὲ μόνον ἀντιλέγειν δύναται, ὅτε τοῖς τρόποις ἀνάξιον καὶ αἰσχρὸν αὐτῇ μνηστεύεται (1.6)." All but the first sentence are manifest glosses. Opinion remained divided. The comments to Basil 22 of Balsamon and Zonaras illustrate the difference and its permanence: Zonaras: . . . συστῆναι γάμον, δηλονότι εἰ καὶ ἡ γυνὴ συναινεῖ. ἡ δὲ συναίνεσις αὐτῆς ἐπὶ τῶν ἄλλων ἐστὶν ἀναγκαία, οὐ μὴν καὶ ἐπὶ πατρὸς τοῦ ἔχοντος ὑπεξουσίαν αὐτὴν. τῷ γάρ πατρὶ ἀντιλέγειν οὐ δύναται, εἰ μή που μεμιασμένον τοῖς τρόποις ἢ ἀνάξιον αὐτῇ μνηστεύεται, κατὰ τοὺς πολιτικοὺς νόμους [viz. the *Procheiros nomos* quoted above]. He continues, using another source and probably contradicting himself: εἰ δὲ οὐ βούλεται ἡ γυνή, κἂν βούλωνται οἱ οἰκεῖοι αὐτῆς οὐ συστήσεται γάμος. Balsamon expresses the other viewpoint: μὴ εἴπῃς ἀρκεῖν τὴν τῶν γονέων συναίνεσιν καὶ μόνην. Ὁσάκις γάμος ἔννομος γίνεται, ἀναγκαία ἐστὶ καὶ ἡ συναίνεσις τῶν μελλόντων συζευχθῆναι, κἂν ὑπεξούσιοι ὦσι, κἂν αὐτεξούσιοι.

See *Peira* 42.5: "Οτι βία ἐστὶ μὴ μόνον τὸ στρεβλῶσαι καὶ ἐγκλεῖσαι, ἀλλὰ καὶ τὸ παρὰ γνώμην τινός, ὅτε μάλιστα κύριος θελήματος οὐκ ἐστὶ διὰ τὸ ἀνήλικον, πρὸς συνάλλαγμα συνωθεῖσθαι. . . . εἰ τὸ ἑκούσιον τῇ κόρῃ τότε προσῆν, διὰ τί ἐπετάχυνε πρὸς τὴν ἱερολογίαν;

The *Eisagoge* further gives a rare glimpse of rebellious youth: "But if the person they [the ὑπεξούσιοι] refuse to be engaged to are not disgusting and unworthy, even if they are prepared to be disinherited in order to get their own way, We decree what they want to be invalid. For the laws propose to set obstacles in every way to the impulses whereby the young pursue their own perdition." *Eisagoge*, 14.10, p. 271,1.

[86] *Peira* 49.22.

[87] Balsamon, to In Trullo 98: Σημείωσαι ἀπὸ τοῦ παρόντος κανόνος ὅτι καὶ πρὸ τῆς Νεαρᾶς τοῦ βασιλέως κυροῦ Ἀλεξίου . . . οὕτω ἐλύετο ἡ μνηστεία, εἰ μὴ ἀπὸ εὐλόγων αἰτίων. Zonaras to In Trullo 98: . . . ὡς νῦν γίνεται ἐπὶ τῶν λεγομένων δεσμῶν, κἂν ἕτερος λάβῃ τὴν γυναῖκα, οὐχ ὑποπεσεῖται τῷ τῆς μοιχείας ἐγκλήματι.

[88] . . . εἰ πρωϊαίτερον τοῦ γαμηλίου καιροῦ ἡ ἐπ' αὐτοῖς νενομισμένη τελεσθήσεται εὐλογία - ἐπεὶ οὖν τὸ καίριον τῆς ἐναντιότητος ἀκριβὴς λόγος ἐντεῦθεν ὁρᾷ - τὸ γὰρ μετὰ τὴν εὐλογίαν διΐστασθαι, τοῦτο ἂν εἴη ἀληθὴς λύσις.

> religious rites before the bride has reached her thirteenth year and the bridegroom completed his fourteenth.

These two novels, with Leo's emphatic exclusion of all engagements contracted before the partners were of marriageable age from those affected by the In Trullo canon, suggests that there had been an upsurge of rigor, filling the place with juvenile adulterers on paper, debarred from marriage, on occasion before they had reached the legal age for it.

Leo's solution seemed well calculated to allow "custom" to govern marriage, while taking care for unnecessary distress, and keeping the Church out of the uncertain business of engagement but reserving for her intervention the final and essential act. This is counting without the concern for purity. Neither the canons that labeled breaking one's engagement adultery, nor the sacred text showing cohabitation of the engaged licit, authorized sexual relations before marriage—nor, needless to say, did Basil's canon, however it should be interpreted. This proved insufficient to prevent them. Reading the legal texts makes it quite clear that neither the austerity of sexual theory in religious texts nor the disembodied quality generally recognized in Byzantine art reliably reflect the reality. Justinian's novel about weeping women, quoted above, suggests that society was not very censorious toward premarital sex. Alexios I Kommenos' two novels on marriage give the context. In the bad old days before his novel, the engaged couple: "approached each other freely, and habit and the freedom of intercourse kindled desire in them . . ." (novel 24, Zepos, *Jus,* IV, 307.36). For:

> If, on the one hand, the old law is in abeyance, and [parents] are unable to arrange full μνηστεία, while on the other hand they refuse to put into execution the dispositions of the new legislation, what are they doing but allowing people who are not legally united to fornicate illegally, and cultivating licentious passions in the souls of the young through this unholy intercourse? (ibid., 309.28).

A century later, Balsamon, commenting on Basil 25, with reference to a specific case, can write: "He should first have been lawfully engaged, and then had sexual relations with her."[89]

This freedom during engagement was seen by rigorous extremists as appalling license that nothing but heavy penance could cure. *Oikonomia,* however, bowed to custom and accepted μνηστεία as conferring certain privileges consonant with its nature as a binding contract, and quoted Basil as authority: "If an anagnost seduce the girl he is engaged to before marriage, he shall be suspended a year and be received back to read. . . . If he indulged in clandestine seduction without engagement, his service is terminated" (canon 69).[90]

The accepting of μνηστεία as a binding contract customarily taken to authorize sex met Deuteronomy halfway: if the liberties of marriage were allowed, its constraints must be submitted to: did not the Council in Trullo equate breaking it with adultery? Were not some marriages forbidden because of an earlier engagement of one of the parties, though it had not led to marriage? Was there any difference between the two?

Very suitably, a jurist tidied all this up. On 26 April 1066, more than a century and a half after Leo's novels, Xiphilinos, patriarch and former nomophylax, issued his *sēmeiōma* extending to affinity the prohibition of marriage to the seventh degree decreed for consanguinity and declaring that engagement that had not led to marriage, regardless of what terminated it, was no different from marriage in creating affinity: "because lawful engagement has the same standing as marriage, it may not be terminated without payment of *prostima,* any more than marriage."[91]

This appeal to *prostima* does not mean that he accepted it; he is using it to prove that engagement is no different from marriage: "If this is the way it is with engagements, and breaking them depends on payment of compensation, it is obvious that he who has contracted an engagement, and broken it according to the laws, and become engaged to another girl, is a digamist" (*Régestes,* no. 896).[92]

Μνηστεῖαι here—both those that create affinity and those that lead to digamy—are termed repeatedly κατὰ τὸν νόμον. That means those of Leo's novels, deliberately defined as a particular class of engagement for partners who have not reached marriageable age. Celebrating them with religious rites is prohibited, and the lawgiver makes it clear that this is to avoid difficulties with

[89] Ὤφειλε γὰρ πρότερον νομίμως μνηστεύσασθαι ταύτην καὶ οὕτω μιγῆναι αὐτῇ Balsamon to Basil 22. At length, with two ἑρμηνεῖαι, to In Trullo 98.

[90] Ἀναγνώστης, ἐὰν τῇ ἑαυτοῦ μνηστῇ πρὸ τοῦ γάμου συναλλάξοιεν, ἐνιαυτὸν ἀργήσας εἰς τὸ ἀναγινώσκειν δεχθήσεται . . . Κλεψιγαμήσας ἄνευ μνηστείας παυθήσεται τῆς ὑπηρεσίας (canon 69).

[91] . . . τῆς νομίμου μνηστείας τοῦ γάμου τάξιν τε καὶ κατάστασιν ἐχούσης, διὰ τοῦτο γὰρ καὶ προστίμων ἄνευ λύεσθαι ταύτην οὐκ ἔξεστιν. PG 119, col. 757A.

[92] Οὕτω καὶ ἐν ταῖς μνηστείαις, τῆς λύσεως μετὰ προστίμου συνισταμένης, πρόδηλον ὡς ὁ μνηστείαν συστησάμενος καὶ κατὰ νόμους διαλυσάμενος, εἶτα ἑτέραν ἀγαγόμενος, δίγαμός τέ ἐστι, καὶ οὕτω νῦν καὶ εἰς τὸ ἑξῆς ὀνομασθήσεταί τε καὶ ἔσται. Ibid., col. 757 AB.

canonical law, which turned engagement into a trap, should there be any reason for terminating it, even the death of one of the partners. This legislation is the main target of Xiphilinos' *sēmeiōma.* The insistence on *according to the law,* and the fact that he does not refer to them as "unblessed" nor mention that they are for the very young, their two distinguishing features, suggests that he wished to avoid some audience recognizing what he was doing. However that may be, Xiphilinos presumably wanted imperial validation. It came in due course, but not until Constantine Doukas had been succeeded by Nikephoras Botaneiates and Xiphilinos by Kosmas I.

Venance Grumel, commenting on this act in *Régestes,* suggests that it met with opposition among the metropolitans.[93] It was rediscussed in synod a year later as τὸ τῆς μνηστείας ἀμφιβαλλόμενον, and again voted upon.[94] Not, however, until 1079–80,[95] at the request of Patriarch Kosmas I, was the new ruling validated, by a chrysobull of Nikephoros Botaneiates. The chrysobull does not reveal whether he read it or not.

The following year Alexios I seized the throne. His partiality for religious affairs is well known, even if the original initiative seems to have come from the synod, which in the spring of 1082 asked for his help with John Italos. But μνηστεῖαι—indeed all aspects of marriage—were the concern of both civil and canon law, and it seems more likely that the judges appealed to him to do something about Xiphilinos' *sēmeiōma,* in the same way as, later, the megas droungarios John the Thrakesian, in the name of the Hippodrome court, was to ask him both to clarify some points in the novel he issued as a result, novel 14, and even to change one important disposition.

In 1084 Alexios issued his novel 14 in the Byzantine tradition of countering the law by appealing to the law. Quite possibly presented officially as a validation of Xiphilinos' *sēmeiōma,*[96] claiming, at all events, to interpret it, it is in fact a renewal, in more purposeful and more explicit terms, of the two novels of Leo VI that Xiphilinos had set out to counter, reformulating them to quash his *sēmeiōma.* Alexios opens (and closes) his novel 14 with the remark that:

> The late patriarch's *sēmeiōma* is seen to have joined as one things that are vastly different [engagement and marriage]. . . . The man in the street, . . . baffled, fails to work out what exactly μνηστεία is, and which way certainty lies. . . . Our majesty, approaching the enquiry more authoritatively, and arbitrating the apparent contradiction as well and surely as is possible, has achieved excellent harmony through the present legislation.[97]

"Solved as well as may be," which occurs again, is presumably not so much imperial humility as a dig at Xiphilinos. Alexios then sets out to define engagement legally, so as to leave no loopholes: (1) Under the old law μνηστεία depended on the will of the contracting parties and was treated as an ordinary contract; (2) nowadays it is, like marriage, accompanied by a blessing; and (3) the legal minimum age for the first union [sc. engagement[98]] was laid down by Emperor Leo: for males their fifteenth year, for females the thirteenth.

The purpose of the decree is given as defining what constitutes legal engagement, the engagement synodically defined as equivalent to marriage: (1) It must have been blessed, but (2) it is forbidden to bless an engagement before the parties have reached the full age laid down by Emperor Leo. The *sēmeiōma* applies only to engagements that meet these conditions.

The blessing is the decisive element also, as Leo astutely observed, in deciding whether In Trullo canon 98 applies.

"Customary" engagements and contracts entered into after the partners have reached the statutory age, but without being blessed, are not engagements as per ecclesiastical rigor, and the effect of the synodic *sēmeiōma* does not apply to them. They are human agreements secured by stipulations, and as far as they are concerned the old law is valid.

However, such marriages as were forbidden by the old law, on grounds not of consanguinity or of marriages actually contracted, but of ["unrealized affinity"], are forbidden in "customary" contracts also (marriage with a girl one's father or brother had been engaged to, etc.). They are forbidden in

[93] "This act [no. 897] probably originated in opposition to the preceding one [896], led doubtless by the metropolitan of Patras."

[94] *Régestes,* no. 897, 19 March 1067.

[95] *Régestes,* no. 915: "Janvier 1080 ou peu avant."

[96] τούτῳ τῷ τρόπῳ καὶ ὁ πρεσβυγενὴς φυλαχθήσεται νόμος ἀκέραιος . . . καὶ ἡ τῆς συνόδου διάγνωσις ἀθιγὴς καθόλου καὶ ἀνεπιχείρητος συντηθήσεται. P. 307.120.

[97] τὰ διεστῶτα χωρὶς ἀλλήλων εἰς ἓν συνάπτουσα φαίνεται . . . καὶ ὁ μὲν πολὺς ἄνθρωπος ἀνεξετάστως τῷ πράγματι ἐπιβάλλων ἀσυλλογίστως ἐπλάζετο, ὅ τι ποτὲ κυρίως ἐστὶν ἡ μνηστεία . . . ἡ δὲ τῆς ἡμετέρας βασιλείας εὐσέβεια ἐπιστατικώτερον ἐπιβαλοῦσα τῇ διασκέψει, καὶ τῇ δοκούσῃ ταύτῃ ἐναντιώσει καλῶς ὡς οἷόν τε καὶ ἀσφαλῶς διαιτήσασα, ἀρίστην τὴν συμφωνίαν διὰ τῆς παρούσης θεσμοθεσίας ἐξεῦρεν. Alexios I, novel 14, Zepos, *Jus,* IV, p. 305.

[98] ἐπὶ τῇ πρώτῃ τῶν συμβαλλόντων συναρμογῇ p. 306, 20 and in the reply to John the Thrakesian: τὴν πρώτην τῶν συμβαλλόντων συναρμογὴν ἤγουν αὐτὴν τὴν μνηστείαν. Ibid., p. 321, 28 (Λύσις τοῦ βασ. Ἀλεξίου κτλ.).

the name of propriety, and are maintained [as against Xiphilinos' "unrealized affinity" treated as equivalent to consanguinity]. This interpretation allows the old law and the synodic resolution, both, to be observed.

Alexios then passes to a new point, independent of Xiphilinos' *sēmeiōma.* The habit had apparently arisen of celebrating the marriage immediately upon the engagement—ἐν ἡμέρᾳ ἢ καὶ ὥρᾳ πολλάκις μιᾷ πραγμάτων διηρημένων ἐκ πλείονος ἀποτέλεσμα,[99] according to the novel. When did this development appear? A case is cited in the *Peira* and considered so abnormal as to imply guilty motives. It is, however, prescribed in a set of rules, author and exact date unknown, summarized in *Régestes:* "Concerning marriages: the nuptial blessing must be given at the same time as the engagement takes place, never before the man has passed fourteen years and the woman thirteen."[100]

One could not ask for more convincing testimony that Xiphilinos' measure, from the viewpoint of the marrying population, created problems. Alexios addressed himself to the task, but his novel was apparently not the answer people wanted. The kouropalates and megas droungarios of the watch, John the Thrakesian, writing the emperor for instructions over a case before the court, ends with an urgent plea for one of its provisions, an important one, to be changed. In the general interest, he wrote, the same minimum age should not be required for engagement as for marriage. Parents were making their children out to be older than they really were because the age for lawful engagement was so high.[101] Evidence, again, of the predominant pattern and of the absence of any general desire to escape from it.

When the law is not attuned to reality, reality finds a way. The case about which John the Thrakesian consulted Alexios involved persons who wanted to dissolve an engagement contracted for their child. They took their stand on the old law and on the penalties stipulated in the contract. The other side took their stand on Alexios' novel. Alexios' *lysis* confirms the obvious: the law is with the defendants. The case having been submitted to the emperor, it was presumably impossible to do anything about it, but it demonstrates none the less clearly that, however explicit the law, it was always possible to argue. And there was another classic solution: vocabulary. The defendants in the case above maintained that μνηστεία could not be terminated by payment of compensation; this was only valid for less solemn contracts: τοῦτο γὰρ πρέπον εἶναι τελεῖσθαι, ὁπηνίκα δεσμὸς προβῇ μόνος or an engagement of seven-year-olds. In other words, there was no reason not to carry on with the old engagement under the name δεσμός.[102]

The equivalence *marašah*-μνηστεία was introduced into a culture where engagement was contracted by parents for young children, but both engagement and marriage were easily dissolved. The coloring imparted by the translation and associated texts led to ecclesiastical legislation that created new and intolerable problems. Emperors tried to solve them by legislation. The attempt to give the most interested parties—the children being tied to their future partner at the age of seven—a chance of escape was at odds with tradition. A curiously close model for these laws is found in the first century of the Christian empire, but not in the codes. It is St. Basil's canon 18, on consecrated virgins who have lapsed into fleshly affections. They are, of course, adulterers, but the canon, an unusually long one, is largely concerned with the question of age. *Mutatis mutandis,* the problem is the same:

> But this must be said first, that [only] she is [properly] called a [consecrated] virgin who willingly offered herself to the Lord and renounced marriage. . . . We recognize professions made when those [who make them] are old enough to reason. The voices of children should not be received in these matters. When

[99] Ibid., p. 308.42.

[100] *Peira* 42.5. *Régestes,* no. 996 [995], § 9 *Nomocanon abrégé.* Implicitly attributed by the ms. to Patriarch Nicholas III Grammatikos (1084–1111); "Il est toutefois difficile que, dans sa forme actuelle, il soit l'oeuvre de ce patriarche." To the reasons advanced one may add that even though, in H.-G. Beck's words, (*Kirche und theologische Literatur* [Munich, 1959], 660), "er nicht immer Lust hatte, das zu vollziehen, was Alexios I K. befahl," so flat a contradiction of the imperial novel seems unlikely. It may be added that, not only the stipulation "en même temps que les fiançailles," forbidden by the 1084 novel, but also the requirement that the marriage be blessed without reference to the μνηστεῖαι, is inconceivable in a patriarchal publication of Nicholas III. The comparison of a set of λύσεις (no. 990 [972] whose attribution to him is confirmed by § 4 on μνηστεῖαι) underlines the impossibility.

Doubt is even thrown in the *Régestes* commentary on any patriarchal origin at all: "Le texte ne porte aucune marque d'émission par un patriarche, Nicolas III (1084–1111) ou un autre...ce doit être un traité de juriste qui reçut par accident un titre attributif."

[101] Zepos, *Jus,* IV, p. 320.36.

[102] Balsamon to In Trullo 98: Σημείωσαι ἀπὸ τοῦ παρόντος κανόνος ὅτι καὶ πρὸ τῆς Νεαρᾶς τοῦ βασιλέως κυροῦ Ἀλεξίου . . . οὐκ ἐλύετο ἡ μνηστεία, εἰ μὴ ἀπὸ εὐλόγων αἰτίων.

Ὅπου δὲ οὔτε φίλημα οὔτε δόσις ἀρραβῶνος παρηκολούθησεν, ὡς νῦν γίνεται ἐπὶ τῶν λεγομένων δεσμῶν, κἂν ἕτερος λάβῃ τὴν γυναῖκα, οὐχ ὑποπεσεῖται τῷ τῆς μοιχείας ἐγκλήματι.

they are over sixteen or seventeen and know their own mind, . . . then they may be reckoned with the [consecrated] virgins. Their profession may be accepted and rejection [of their vows] punished. But numbers of them are brought, too young, by parents or brothers or other relations, not because they have chosen celibacy, but for the convenience [of those who bring them].

The question posed by ἁρπαγή cannot be solved in simple terms of convenience or Byzantine law. A possible clue was referred to earlier: the law forbidding marriage to the man to whom you were engaged if he carried you off was not drafted to provide young men with a way out of an engagement they were tired of. Like the reference to abduction carried out with the assent of the girl's parents,[103] it speaks of practice. It is to anthropology one must turn. One can hardly doubt the explanation lies in survival, perhaps in more than one part of the empire, of the well-known bride-ravishing marriage rite of many exogamous societies. In a recent communication devoted to the theme of bride-snatching in *Digenis* and other popular poetry, Peter Mackridge said: "Its raison d'être is to be sought not in historical events but rather in the organisation, attitudes and customs of the societies in which the poems were produced." If this is true for poems, it is also true for laws.

Indeed we may carry his conclusions a little further, where he says: "Abduction [was seen] as the peak of manly valour . . . not so much because it relates what regularly occurred between men and women, as because it encapsulated an extreme ideal of 'aggressive manliness' . . . which the menfolk of the community would like to have lived up to, a role model which they could attempt to emulate, albeit in a symbolic fashion." The legislation suggests it was by no means exclusively symbolic.

The conclusion would then be that ἁρπαγή and μνηστεῖαι were alternative initial marriage rites. Μνηστεῖαι were partly contracts of a society that did not view marriage as sacred, partly religious rites, linked with ancient interdicts and newer theological problems. Ἁρπαγή survived from the days before the Roman rule of law and order. It smacked of imperfect submission, and it is no surprise that imperial law was determined to root it out and that the Church saw no reason for supporting the state here, but found ἁρπαγή, for all its show of violence, easier to deal with than the uneasy business of μνηστεία.

Louvain

Zonaras to In Trullo 98. Εἰ γὰρ οὐ προέβη μνηστεία ἀλλὰ συμφωνία δόσει προστίμου κατωχυρωμένη, οἷά εἰσι τὰ σήμερον γινόμενα δεσμοτικὰ χαρτία. Balsamon to In Trullo 98.

[103] *CTh* 9.24.1: si quis nihil cum parentibus puellae ante depectus. . . .

Appendix

1. Xiphilinos. Synodic decision. 2. Xiphilinos. Second synodic decision. 3. Alexios I. Novel 24. 4. John the Thrakesian. Memo to Alexios I.

1. Xiphilinos. Synodic decision

Even if the late patriarch the lord Sisinios in his synodic tome concerning prevented and forbidden marriages did not explicitly and in words make mention of engagements also, yet:

(1) since the civil law utterly prevents the marriage of a girl who has been engaged to a father or a brother, to their son or brother, because, in the one case, she counts as stepmother, in the other as sister-in-law; even if the marriage did not take place, and the same holds good for the girl engaged to an adopted son; even if the relationship is broken off, the adopted father may not marry her, as being his son's fiancée and bride;

(2) and since, to this day, he who has been engaged to a girl, and lost her, through death or repudiation or by common agreement or the payment of compensation, and then taken another, may not be ordained priest or deacon or subdeacon, because he is reckoned a digamist.

It now appears right to Our Mediocrity and to the whole sacred permanent synod for all unlawful and forbidden unions, not those only where there have been marriage and holy rites, to be prevented and called unlawful. If engagement, according to the law, has been contracted, and terminated without marriage having followed, whether because of death or some other cause, it shall not be possible for either of the parties to be joined in lawful marriage, recognized [as such] by the laws and the holy canons, to any relation of the other in a degree of propiniquity that would prevent marriage, or in any other way introduce illegality. Such a union shall not be called marriage nor have any validity, since lawful engagement is of the same order and condition as marriage.

And therefore it cannot be terminated without compensation—for forbidden ones there is a nomocanonical

rule to the effect that where the contract is contrary to the laws no compensation may be asked for—but where the engagement is valid and legal, it is as with marriages: compensation is given. If there is repudiation, and the woman is at fault, the man takes the profits. If the fault is the man's, the woman carries them off.

If it is so with engagements, and breaking them depends on payment of compensation, it is obvious that he who has contracted an engagement, and broken it according to the laws, and become engaged to another, is a *digamos* and for ever shall be called and shall be so. The same holds for women, since the laws decree that what is valid for one sex is equally so for the other, both in marriage and in other contracts.

We therefore declare expressly, that all such persons as are, by the civil laws or the sacred canons or the aforementioned synodic tome, or the other synodic and imperial decree on trigamy, prevented from being joined in marriage, are manifestly prevented in the same way by engagement, and there is no difference between marriage and engagement in establishing what is permitted and valid.

2. Xiphilinos. Synodic decision

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. . . The same day, after the senators had all left . . . the question under debate concerning μνηστεία was raised: in marriage contracts where the law on consanguinity constitutes an impediment, should μνηστεία be reckoned as marriage, and the union that will follow be allowed, or rejected as illegal, opposed to the laws and an offense to the holy canons? All the most holy hierarchs present were questioned, and they said unanimously and unambiguously that that contract must be prevented, where, after an engagement not followed by marriage, another contract is to be concluded with a person prevented whether by relationship or evident affinity, on the one hand seeing that the ninety-eighth canon of the holy ecumenical sixth synod says, in these words: He who marries a woman engaged to another man, in that man's lifetime, is guilty of adultery (for if the holy fathers had not reckoned μνηστεία to be of the same order as marriage, but something different, how would they have made the man who marries a person engaged to another guilty of adultery? It is with a married woman, obviously, that adultery is committed, and the canons do not treat as one and the same thing the estimation or the manner of penalties for adultery and for fornication). On the other hand, the civil law too, title 5, book 28 of the Basilica, says: My father's or my brother's affianced I may not marry, even if they have not become their wives. For the one counts as stepmother, the other as sister-in-law. And a few chapters further on: Even if my father had a number of them, I take none of them. Nor yet the mother of the girl I was formerly engaged to; she is become my mother-in-law. So it is clear, here too, that the legislators equated engagement with marriage, and held it unlawful for [such a union] to take place and decreed that it could not be joined. And these are concerned with affinity. For after counting the prohibitions for consanguinity, they produce other [marriages] that cannot go forward, not because of relationship, but because of affinity. And the headings mentioned stand in the list of these impediments.

The most holy hierarchs present were of one mind concerning this canonical and legal opinion and agreed to think and speak in conformity with it, and undertook with one voice neither to think nor to act in opposition. For they said that in enlisting for the priesthood also, and in ordaining, this was what they did. When someone having contracted an engagement with one person, but without being joined in marriage, parted from her, in whatever manner, and contracted legal marriage with someone else, he did not receive ordination as a priest, nor, if he was ordained—out of ignorance, perhaps—had this ordination any value. He was excluded from priesthood as a *digamos*. And if anyone takes in marriage someone who has been engaged to another, he too is prevented from ascending to the priesthood. They all simultaneously affirmed that this they knew, and said and voted by acclamation that it was absolutely necessary to act accordingly.

3. Emperor Alexios Komnenos. Novel 24, "*De sponsalibus*" (A.D. 1084)[104]

The ancient and earlier legislation set the boundaries of engagement and marriage far apart and left more distance between than the proverb does between those of the Mysians and Phrygians.[105] The *sēmeiōsis* of the late patriarch K. John Xiphilinos, drafted after examination in synod and validated by a chrysobull of the late emperor Nikephoros Botaneiates, is seen to have joined as one things that are vastly different. So that [now] all that (306.1) the synodic tome [of Sisinios] ruled for marriage, the *sēmeiōsis* explicitly attributes to engagement, forbidding two brothers to get engaged to two first cousins.

The man in the street, approaching the matter without reflection, cannot fathom the significance of the synodic enquiry. Irrationally baffled, he fails to work out what exactly μνηστεία is, and which way certainty lies, and sets up, perhaps, his unconsidered opinion against [their] ecclesiastical rigor. But the piety of Our majesty, approaching the enquiry more authoritatively, and arbitrating the apparent contradiction as well and surely as is possible, has achieved excellent harmony through the present legislation.

1. (306.12) The old law makes μνηστεία depend on the will of the contracting parties and enquires only after

[104] Zepos, *Jus*, I, 305–9.

[105] Χωρὶς τὰ Φρυγῶν καὶ Μυσῶν ὁρίσματα, proverb quoted by Strabo, 12.4.4, ed. F. Lasserre (Paris, 1981), IX.113.

disposition and attendant contracts and engagements. For us, by God's grace, vital matters have progressed to something far more fitting and holy, so that not marriage only, but μνηστεία also is accomplished with blessing, and the age at which the parties may first contract is laid down by a novel of Emperor Leo the Wise, for males the fifteenth year of their age, for females the thirteenth. This was the age considered sufficient for complete marital cohabitation by the old law. Our puissance considers it fitting to declare by the present decree what constitutes an engagement in the full sense of the word and, to put is simply, [defined] as equivalent to marriage according to synodic precision. That it is, when blessed after [the parties] have reached the full age laid down by Emperor Leo, and it is with respect to such engagements that the observance of the synodic tome is obligatory.

For if perhaps one of the contracting parties should chance, on account of death or some other chance circumstance, or having changed his mind, to default and set up with another partner, no slight impropriety ensues, with the anticipatory marriage blessing already pronounced, if the engagement is treated as something casual and accessory (307.1), and the whole matter made light of, as if God had not been brought in, through the engagement, as intermediary between the parties. Shrewdly reconciling with this the canon of the holy and catholic sixth synod, which forbade an engaged woman, as long as the man she was formerly engaged to was among the living, to enter into marriage with another, explicitly terming such action adultery,[106] the aforesaid late emperor reconciled the apparent contradiction of the old law, when he pronounced separation after the blessing on the engaged couple to be the true breaking of the engagement.

And if some engagements have already taken place according to the custom generally observed, and contracts have been entered into, but before the age of the blessing that is obligatory for Christians, without the priest having pronounced the customary prayers for engagements, these neither are nor are termed engagements as per ecclesiastical rigor, and certainly the effect of the synodic *sēmeiōma* does not apply to them, since they represent simply human agreements secured by stipulations, and as far as they are concerned the old law is valid.

In this manner, the elder law, that was promulgated before, concerning engagements, is preserved intact, and the synodic resolution is observed untouched and unassailed, [if it be] envisaged and interpreted as in the present examination.

2. (307.25) And since this has been interpreted in this manner and [its meaning] correctly and reliably discerned (insofar as possible), and true engagements, accurately so termed, have been ruled to be those that are recognized to have been celebrated with the holy blessing—at the legal age, naturally—while those carried out according to the old law are allowed the efficacy of private agreements secured by stipulations, and for them the old law alone is allowed validity, [the novel now introduces forbidden marriages, specifically resulting from a broken engagement] which designated certain persons as forbidden from approaching the girl whose engagement had been broken off.

And now something should be added to the present law, belonging to the decency proper to Christians. Seeing that the law old and new was not observed with suitable rigor, but the great mass of people clinging to the authority of the older law, (308.1) openly celebrated engagements once [the parties] were seven (see note 83), and each freely approached [his] affianced, habit and the freedom of intercourse kindled desire in them. Then, although the holier way, in accordance with the imperial novel [of Leo IV] separated engagement and marriage, reciting the prayers for engagement first and then those for marriage, these [rites] came to be performed at one and the same time, and engagement and marriage were circumscribed in one brief space with hardly a moment between. Our Piety, rectifying a practice arisen without due examination, decrees by the present general edict that contracts entered into when the parties are seven and up to the year fourteen or twelve of their age, in the form of engagements, are in no way accounted legal or valid engagements but as secured stipulations having the nature and binding power of other contracts, and that this is to be their nature among all our subjects, while the old law concerning engagements must have complete validity regarding persons forbidden to approach the girl whose engagement has been broken off, because of the exceptional nature of the condition befitting Christians (308.21). For if μνηστεία is not in all rigor achievement of its end, yet because it has that end in view, and the foundation of marriage begins there in anticipation, it would be very reasonable for the persons prevented by [the old] law to be prevented again, and no one shamelessly to presume to marry a woman whom the old law, because she had been engaged to someone, did not allow, after the engagement was broken off, to marry someone else.

When, however, [the parties] have reached the age that We have recognized as suitable for engagement as well as marriage (viz. the female to have completed her twelfth year, the male to be over fourteen), then the engagement is first to be celebrated with holy rites and the customary observances, viz. the *arrhabōn* and the kiss dear to the engaged, only then, after an interval of greater or lesser duration, as those to be married may decide, legal marriage shall imprescriptibly take place, but not the conclusion in one same day and hour, as often happens, of matters (309.1) that are very different.

If this procedure is observed for marriage, the old law will be observed, with its list of forbidden persons, [by] forbidding them access to the girl a close relative has been engaged to, and the novel of the most Wise emperor will be seen in due manner to have full validity

[106] In Trullo 98.

and currency, while the contracting parties, prevented from untimely and indecent intercourse, will come in chastity, at the proper time, with holy rites, to set up house together, when μνηστεία and marriage may unite them.

3. Should anyone dare, disregarding the directions of this edict of Our Puissance, arrange an engagement, and be seen to disregard this general [edict] promulgated, this 1 July of the seventh *epinemēsis* of the year 6592, for all [Our subjects] and valid henceforth, and should dare to arrange for *arrhabōn* or blessing before the legal age, or allow the contracted [but not engaged] pair to meet and exercise no supervision . . . [penalties for the notary and the responsible parties].

And We believe that God Himself will rise up against them because they did not shrink from introducing fornication, openly and deliberately, among the young. For if, on the one hand the old law is in abeyance, and they are unable to arrange full μνηστεία, but on the other hand they refuse to carry out the dispositions of the new legislation, what are they doing but allowing persons not legally bound to fornicate illegally, and cultivating licentious passions in the souls of the young through this unholy intercourse?

4. Memo of the kouropalates and megas droungarios of the watch John the Thrakesian to the same emperor concerning a question raised by this novel

My sacred Lord, certain persons who had contracted a marriage engagement for their children, being afterwards dissatisfied with the transaction, appealed to your Majesty and were referred to the court of the Hippodrome, where they pleaded to [be allowed] to pay the penalties stipulated in the contract and break off the engagement. The opposing party contended that it was indissoluble, and that it could not, as formerly, be broken on payment of a penalty, and in support [of their case] they advanced the novel concerning engagements published a little time past by your Majesty, which, turning away from the old laws, decreed that engagement could only be formally entered into when the male was over fourteen, the female over thirteen, the customary prayer to be then pronounced and the other customary observances carried out (viz. the *arrhabōn* and the kiss), as the late emperor Leo the Wise legislated,[107] and then, after a short interval, or even fairly long, as those to be married may decide, the marriage may proceed, but not fall on the same day and hour.

Differing interpretations split the court. Some said the fine should be paid and the engagement broken, arguing that, if this does not happen, what is the difference between marriage and engagement if the prerogative of marriage belongs to engagement too? And further, that this is the specific property of *arrhae* (in the words of the law), that if he who has advanced them does not carry out that which has been agreed, he loses his deposit, whereas if [the defaulter] is the party who received it, he returns it double.

The other side reckons that the engagement remains unbroken, they say it would not be fitting for that which was decided by common consent of the parents, after the young people had reached the [required] age, and had received the seal of holy prayers, should be broken by paying a fine. This is suitable where there is *desmos*[108] only, or an engagement of seven-year-olds after the old fashion, which your Majesty's law declares not to be an engagement.

The court being thus divided, I, your unworthy servant, refer the matter to your Majesty, requesting to be informed to which of the two opinions one should adhere. For both sides advance arguments that appear reasonable, and I beg to receive, in a worshipful rescript, an interpretation that resolves the question clearly and precisely, since it will rank as law hereafter. The decree must be absolutely unambiguous and precise, so that there should not again be conflicting interpretations afterwards.

As far as finding a solution goes, your sacred Majesty will opt for the most merciful one, but I make bold to refer also to the age [question]. Your unworthy servant feels that it is not right that the same age should be required for engagement and for marriage, but that marriage should have a slight advantage in the matter of age too, distinguishing it from engagement, and that for engagement less should be required. For I am convinced this would be, without any doubt, in the public interest.

For parents, possessed by affection for their children, eager to provide for them as quickly as possible and be able to relax, find the obstacle created by the age limit heavy and hard to bear. There are some who disregard their duty and lie about ages, driven by parental fondness to forswearing themselves. And if this could be removed and the age of engagement reduced, the distress that dereliction of duty breeds in parents would be healed along with the ills that may be suspected to accompany it; lying and forswearing would be befittingly reduced, and your sacred Majesty would reap indescribable honor and magnificence and glory, and unceasing and lasting prayers, [you who] are ever exerting yourself for your subjects' benefit, for what is useful and salvific for them.

[107] Leo VI, novels 74 and 109.

[108] δεσμός: see note 102 above.